

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA,)
 Plaintiff,) Case No. 11-512
 vs.)
FRANK PEAKE,)
 Defendant.)

TRANSCRIPT OF FURTHER JURY TRIAL
BEFORE THE HONORABLE DANIEL R. DOMINGUEZ
FRIDAY, JANUARY 25, 2013
SAN JUAN, PUERTO RICO

APPEARANCES:

FOR THE PLAINTIFF: BRENT SNYDER
 CRAIG Y. LEE
 MICHAEL WHITLOCK
 HEATHER TEWKSBURY
 ASSISTANT U.S. ATTORNEYS

FOR THE DEFENDANT: DAVID OSCAR MARKUS, ESQ.
 A. MARGOT MOSS, ESQ.

Proceedings recorded by mechanical stenography, transcript
produced by computer.

1 THE COURT: Please call the case.

2 THE CLERK: Criminal case 11-512. United States
3 of America vs. Frank Peake.

4 THE COURT: Okay. Before we move on, the Court
5 must make its *Petrozziello* finding prior to the -- at
6 the close of the case, but prior to the final
7 argument.

8 So the Court makes the following *Petrozziello*
9 determination pursuant to the case of *United States*
10 *vs. Petrozziello*, 548 Fed.2d., 20, 1st Circuit, 1977;
11 *United States vs. Campa*, 679 Fed.2d., 106, at
12 Page 111, 1st Circuit, 1982; *United States vs.*
13 *Martorano*, 557, Fed.2d., 11, 1st Circuit, 1977; and
14 pursuant to the procedures set forth under *United*
15 *States vs. Ciampaglia*, 628 Fed.2d., 632, 638. See
16 also *United States vs. Mitchell*, 596 Fed.3rd. 18 at
17 Page 23, 1st Circuit, 2010.

18 The Court determines that the United States has
19 proven by a preponderance of the evidence that a
20 conspiracy, as indicated in count one of the
21 Indictment, existed; that declarants, co-conspirators,
22 Peter Baci and Gregory Glova and Gabriel Serra were
23 members of the conspiracy; that the declarations of
24 co-conspirator Frank Peake as to the statements that
25 were made by Peter Baci, Gregory Glova and Gabriel

1 Serra, were made during the course while they were
2 members of and in furtherance of the conspiracy. And,
3 hence, those declarations are authorized and
4 admissible pursuant to Federal Rule of Evidence
5 801(D)(2)(E).

6 All right. The defense wishes to renew its Rule
7 29 now.

8 MR. MARKUS: Yes, Your Honor. We renew our Rule
9 29 on all elements of count one. And I don't know if
10 Your Honor would like me to just also go through the
11 objections that we have to the jury instructions now.

12 THE COURT: No. Those are preserved, respected.
13 And at the end of the Court providing the
14 instructions, I will provide you space for you to
15 place all the objections that you mentioned in the
16 conference yesterday.

17 MR. MARKUS: Thank you, Your Honor.

18 THE COURT: Including the fact that the Court did
19 not allow a theory of the defense which you requested,
20 and others; missing witness that you mentioned. So
21 the Court is not going to stop the record for you on
22 that.

23 MR. MARKUS: Thank you, Judge.

24 THE COURT: In fact, I encourage you to do it at
25 the end of the instructions.

1 MR. MARKUS: Thank you.

2 THE COURT: All right. Now, can we bring in the
3 jury?

4 MR. MARKUS: Yes, Your Honor.

5 THE COURT: Okay. I will be advising the jury
6 that you both have equal time, that you have chosen
7 one hour and 45 minutes.

8 MR. SNYDER: Your Honor, I do believe it's going
9 to be fairly less than that.

10 THE COURT: An hour-and-a-half?

11 MR. SNYDER: Probably a little less than an hour-
12 and-a-half even.

13 THE COURT: Okay.

14 MR. SNYDER: An hour.

15 THE COURT: An hour-and-a-half. That, however,
16 you may finish before, and you will not turn into
17 pumpkins if you finish before, nor will there be
18 attorneys looking for Cinderella shoes, as one of you
19 may exit quickly.

20 But the idea is that it's equal time, all right?
21 Okay? And that the United States may reserve rebuttal
22 time within this hour-and-a-half, which may be
23 shorter.

24 MR. MARKUS: The only other issue is I gave Omar
25 the chart that we had planned to use.

1 THE COURT: Okay. I saw your chart, but your
2 chart is incomplete because you left out that it
3 doesn't have to be 100 percent; right?

4 MR. MARKUS: Well, Judge, the Government can argue
5 and that's in the instructions. What's in the chart
6 is an accurate statement of the law. And as long as
7 it is accurate, we can make argument, I believe, and
8 the Government has been pretty free --

9 THE COURT: I will allow you to do that, but I
10 will state to the jury that my instruction may
11 supersede that.

12 MR. MARKUS: Thank you, Your Honor.

13 THE COURT: Will supercede that.

14 MR. MARKUS: Yes, sir.

15 THE COURT: So I will authorize that.

16 Put that on your side of the scale.

17 MR. MARKUS: Thank you.

18 THE COURT: You that are keeping a score board on
19 this, which I don't keep.

20 MR. MARKUS: Coming up to the ninth.

21 THE COURT: All right. Bring in the jury, please,
22 Mr. Bruno. Where is he?

23 Bruno is doing the duty of their lunch?

24 THE CLERK: Yes, Judge.

25 THE COURT: Now, there is this rule. The rule is

1 no closer to there. You see the podium? You see the
2 tip of the podium?

3 MR. LEE: Yes.

4 THE COURT: You see where he's standing? That's
5 as close as you can get to the jury.

6 Straight line. No sitting on the bench. No
7 Hollywood. All right? No sitting on the bench,
8 joking around with the jury. There's a straight line
9 going from there up to here.

10 MR. LEE: So I am okay here.

11 THE COURT: It's fine there. But it goes one
12 further step. That's it.

13 MR. LEE: No problem.

14 (Whereupon, the jury enters the courtroom)

15 THE COURT: So we have come to the last part of
16 the case, the final arguments of the parties.
17 Arguments are not evidence. They are going to both
18 interpret the evidence for you. If you understand
19 that they're interpreting it wrongly or a little bit
20 one-sidedly, either side, that's up to you to decide.
21 They are here to orient you as to the facts they
22 understand they proved.

23 Each side has equal time. They have chosen an
24 hour-and-a-half, but we're going to divide it. The
25 United States is entitled, because they have the

1 burden of proof of proving beyond a reasonable doubt
2 this case, they are entitled to rebuttal. They can
3 reserve. So time is equal as to both of them, an
4 hour-and-a-half. But they may finish before. Don't
5 take it against them if they finish before. In other
6 words, if they finish before that means that they
7 organized their thoughts and they presented it in a
8 more concise fashion. Don't take it against either
9 side if they take less time. All right?

10 So taking that into account, in my watch it is
11 10:14. You are entitled to an hour-and-a-half.

12 MR. LEE: Yes, Your Honor.

13 THE COURT: But if you use up all the hour-and-a-
14 half, there will be no time for rebuttal. All right?

15 So here we go. Thank you. We're very happy
16 you're here.

17 MR. LEE: Thank you, Your Honor. I'm happy to be
18 here. May it please the Court.

19 THE COURT: Yes, sir.

20 MR. LEE: Good morning, ladies and gentlemen.
21 Frank Peake committed a crime. Instead of competing,
22 he cheated his customers, and the customers paid the
23 price.

24 Instead of competing, he conspired with his
25 friends, and Sea Star's profits grew. Instead of

1 competing, he chose to break the law, a law designed
2 to protect competition.

3 Price-fixing is a crime that takes place behind
4 closed office doors. It takes place over e-mails and
5 over phone calls. It takes place in hotel rooms. A
6 crime where the customers think they are negotiating
7 hard with the companies and getting the best deal.

8 Meanwhile, the companies have already decided who
9 is going to win the business. A crime where its
10 victims don't even realize that they are being ripped
11 off. Where they think the companies are competing,
12 they're really colluding. Where the customers pay the
13 higher prices charged by the companies because they
14 have no choice.

15 But Frank Peake, he had a choice. When he became
16 president of Sea Star, he had a choice of how he
17 wanted to run the business. He could have run it the
18 right way or the wrong way. And when he learned that
19 Sea Star had an agreement, an illegal agreement with
20 the only other company that provided fast ship service
21 to Puerto Rico, he had a choice, and he made a choice.
22 He could have chosen to put a stop to the illegal
23 agreement, an agreement that divided the market in
24 half, an agreement that raised rates, an agreement
25 that coordinated the timing and the amounts of the

1 fuel surcharges.

2 He was the president of the company, the
3 president. And he had a choice. He made a choice.
4 He chose to join the conspiracy. He chose to approve
5 the actions of his direct employee, Peter Baci; to
6 approve Peter Baci's communications he had with
7 Horizon; to approve of Peter Baci his day-to-day
8 involvement in splitting the market share in half,
9 half for Sea Star and half for Horizon. But Frank
10 Peake did more than just approve. He chose to
11 participate. He stepped in when he needed to fix
12 problems, problems that Baci was having with Greg
13 Glova, problems about the conspiracy. And to fix
14 those problems, he chose to work with his old friend,
15 his old friend from Horizon, Gabriel Serra.

16 Frank Peake, he chose to join the conspiracy.
17 Frank Peake already had every advantage. His company
18 was one of only four companies that served the Puerto
19 Rico trade market. And his company was just one of
20 two that offered the fast ship service.

21 But limited competition wasn't enough. He wanted
22 to eliminate all competition, and with the help of
23 Peter Baci and his friends at Horizon, he did.

24 Judge Dominguez will instruct you that there are
25 three things you need to find in order to return a

1 guilty verdict. And these things or elements are what
2 the United States needs to prove. Think about them as
3 questions, questions you should ask yourself while
4 evaluating the evidence, questions you should discuss
5 with your fellow jurors once it comes time to
6 deliberate.

7 And the first element or question is whether there
8 was a price-fixing conspiracy at all.

9 And the second is whether defendant Frank Peake
10 knowingly and intentionally joined this conspiracy.

11 And the third element is whether the conspiracy
12 had an effect on interstate commerce.

13 As to the first element, there is no doubt there
14 was a conspiracy to fix prices in the Puerto Rico
15 trade lane. As Judge Dominguez will instruct you,
16 fixing prices means agreeing with competitors about
17 prices, rates, price levels or surcharges. Fixing
18 prices means deciding which company will submit the
19 higher rate to determine who will win the contract.
20 And fixing prices is agreeing, agreeing to amounts and
21 when to apply those surcharges.

22 The agreement to fix price is the crime. And this
23 first element, it's not even in dispute in this case.
24 During her opening, Ms. Moss said that -- told you
25 about this conspiracy to fix prices between Sea Star

1 and Horizon. And you saw for yourself the
2 overwhelming evidence of the conspiracy, from the
3 witnesses, from all the documents; that they fixed
4 prices for nearly every contract and that they worked
5 together to raise prices every single year.

6 You also need to find that the conspiracy existed
7 at some point within the period of the statute of
8 limitations. And one way that can be proved is if
9 some member of the conspiracy, any member, it doesn't
10 have to be Frank Peake, but any member performed some
11 act in furtherance of the purposes and objectives of
12 the conspiracy after September 17th, 2006, and before
13 November 17th, 2011.

14 And there are plenty of acts in furtherance of the
15 conspiracy between that time period. For instance,
16 Greg Glova, he told you about the illegal agreement
17 and how it affected nearly all of his two hundred plus
18 accounts. And he told you that he coordinated with
19 Peter Baci for nearly every one of those accounts,
20 starting when he first joined -- when he first took
21 his position and joined the conspiracy at the end of
22 2005, all the way up until April of 2008, when the
23 F.B.I. had their search warrants.

24 And this statute of limitations, as well as this
25 first element, they're not a question at all, based on

1 all the evidence you've seen in this case.

2 And, in the same way, the third element, it's not
3 going to be an issue either. All this question asks
4 you to find is whether goods transported on Sea Star
5 and Horizon ships traveled between the states and
6 Puerto Rico. And you heard plenty of evidence that
7 they did. That was the exact service provided by
8 Horizon and Sea Star.

9 Remember the two witnesses, Mr. Gabriel Lafitte
10 from Burger King, and Ron Reynolds from U.S.D.A.?
11 They testified about the need to transport goods from
12 the states to Puerto Rico on Sea Star and Horizon
13 ships.

14 So that just leaves one element, just one question
15 for you to decide in order to find Frank Peake guilty:
16 Did the defendant knowingly and intentionally become a
17 member of the conspiracy? And as Judge Dominguez will
18 instruct you, "knowingly" means not by accident or by
19 mistake. And that's the real issue in this case.
20 That's the only issue in this case.

21 We don't have to show that Frank Peake started the
22 conspiracy. It doesn't matter one bit that the
23 defendant joined the conspiracy after it was already
24 in motion. Judge Dominguez will also instruct you
25 that even if the defendant was not part of the

1 agreement at the very start, he can be found guilty of
2 conspiracy if the Government proves that he knowingly
3 joined the conspiracy later. You can get on the train
4 at the first stop or you can get on at the last stop.
5 All that matters is you got on.

6 As an example, look at Greg Glova. He wasn't
7 there at the beginning. In fact, he was the last
8 person to join the conspiracy. He joined after Frank
9 Peake. But he was just as much part of the conspiracy
10 as the people who were there in the beginning.

11 We don't have to show that Frank Peake knew about
12 every gmail that was sent between Baci and Glova, or
13 show that Frank Peake talked with Serra about every
14 single contract. All you need to find is that Frank
15 Peake knowingly and intentionally joined the
16 conspiracy. Not that he was an originator, not that
17 he was the mastermind, and not even that he was the
18 day-to-day person.

19 We know he joined the conspiracy by looking at the
20 evidence. Do you remember the witnesses? People who
21 had firsthand knowledge because they talked to Frank
22 Peake directly about the conspiracy. Witnesses who
23 testified because they're who Frank Peake chose to
24 conspire with. People who admitted to their crimes,
25 have taken responsibility and who have gone to prison.

1 And every single one of them said that nothing they
2 said at this trial can make their prison term even one
3 day shorter, because they already did their time.

4 You saw them take the stand and testify about
5 Frank Peake's involvement. You saw how they took no
6 joy in being here. You saw how they sat there and
7 they didn't relish testifying against Frank Peake.

8 You saw how they weren't out to get anybody. You
9 saw how hard it was for Gabriel Serra to testify
10 against his friend. But they did testify. And
11 everything any witness said about Frank Peake's
12 involvement in the conspiracy was corroborated by the
13 other witnesses or by a document.

14 And remember when the witnesses told you that they
15 realized that what they were doing was wrong, so they
16 tried to hide it. For Greg Glova and Peter Baci, they
17 used code names. They used secret gmail accounts.
18 And for Gabriel Serra, he stayed hands off and he only
19 stepped in when he needed to. And Frank Peake, he
20 tried to cover his tracks too. You heard how he did
21 it. You heard from Peter Baci how Frank Peake got
22 angry when he copied him on a gmail to Greg Glova; not
23 upset that Peter Baci was communicating with a
24 competitor, but angry that he was creating this
25 electronic trail that could be traced right back to

1 him, traced back to show that Frank Peake was involved
2 in the conspiracy. And Peter Baci testified to that.
3 He said there was one point this time where I copied
4 Mr. Peake on a gmail communication that I had with
5 Horizon Lines, and Mr. Peake came to me and asked me
6 not to do it again.

7 And you heard Peter Baci testify that Frank Peake
8 told him to do something else, to avoid this
9 electronic trail. He was asked the question: Would
10 you ever give him hard copies of e-mails?

11 Answer: Yes. It was something that I thought was
12 important. I would print it out and put it on his
13 chair or desk and leave.

14 Why did Frank Peake ask Mr. Baci to do this? He
15 did this so he could cover himself. Cover himself in
16 case there ever was an investigation. He wanted to
17 make sure that if that day came, he could say, "It
18 wasn't me, it was all Baci's doing. You don't see me
19 on any of these gmails."

20 Frank Peake, he thought he could fool everyone.
21 But as much as he wanted to keep his hands from
22 getting dirty, he still left fingerprints.

23 And in cases like this, cases involving financial
24 crimes, the e-mails you saw at trial, that's like the
25 fingerprint evidence. And Frank Peake's fingerprints

1 are all over this case. These e-mails support
2 everything that the witnesses said on the stand;
3 documents written when these things were happening,
4 long before an investigation and long before trial.
5 Written by the defendant's own hand. E-mails that
6 Frank Peake sent to Gabriel Serra, with no other
7 reasonable interpretation other than they were
8 discussing aspects of the conspiracy.

9 As you will remember, you saw a lot of these
10 e-mails, a lot of these e-mails at trial; e-mails with
11 Frank Peake's name all over them; e-mails that were
12 sent and received to further the conspiracy.

13 We won't have time to go through them all today,
14 and I'm guessing, you wouldn't want me to show you all
15 of them again either. But I will show you some,
16 enough to give you comfort that when you go back into
17 the jury room you can find Frank Peake guilty.

18 If you can pull up Exhibit 34. Here is just one
19 example of the many e-mails we saw at trial. On
20 March 22nd, 2008, Frank Peake sent an e-mail to Gabe
21 Serra, complaining under the subject line "Ouch,"
22 about four accounts that Sea Star expected to win but
23 ended up losing.

24 Peake blamed Horizon for not following through on
25 agreements and submitting lower prices than they were

1 supposed to.

2 And Serra replies, he gives explanations as to why
3 Sea Star lost those accounts, but he also refers to
4 poor communication, poor communication between Glova
5 and Baci. And what did Peake write in response?

6 "Agree that things aren't working as well as they
7 were. Pete has similar complaints."

8 Is this competition? Is this how you speak to the
9 competitor, complaining about losing accounts and
10 asking for explanations by blaming it on poor
11 communication between your lower level employees?

12 What could this mean other than that Frank Peake
13 knew about the conversations between Glova and Baci?

14 What could this mean other than Frank Peake knew
15 about this conspiracy?

16 What could this mean other than Frank Peake was
17 involved in the conspiracy?

18 How did Frank Peake join the conspiracy? We'll
19 talk about three different ways.

20 First, through his role as a problem fixer in the
21 conspiracy.

22 Second, through his participation at the Orlando
23 meeting; a meeting that was, without a doubt, a
24 meeting to discuss the conspiracy.

25 And, third, through his agreements to coordinate

1 the timing and amounts of the bunker fuel surcharge.

2 Frank Peake, he was a problem fixer. And in order
3 to understand what I mean by problem fixer, consider
4 everyone's role in the conspiracy.

5 First, you have Greg Glova. At Horizon, he was
6 the day-to-day person for communicating with Sea Star.
7 Glova had meetings, he had phone calls, and of course,
8 he had e-mails with Peter Baci on a near daily basis.

9 An then Peter Baci, just like Glova, he was a
10 day-to-day person, too, only he was at Sea Star. And
11 most of the communications, most of the e-mails were
12 between the two of them because they handled the
13 details.

14 Greg Glova and Peter Baci, they did the daily
15 dirty work to make sure that Horizon and Sea Star were
16 able to split the market and charge higher prices.

17 An for the most part, the two of them did a good
18 job, a good job making sure the conspiracy ran
19 smoothly. They stayed out of each other's way and
20 they kept to the 50/50 agreement. They also raised
21 the rates every chance they could. But it wasn't
22 always smooth sailing. Sometimes someone would slip
23 up. Sometimes there was a miscommunication. And
24 sometimes there were problems. Sometimes these
25 problems were ones they couldn't handle on their own.

1 It's not the case that there were problems all the
2 time or problems with even most of the accounts, but
3 when problems did come up, what's important is not how
4 many or even that there were problems, but how those
5 problems were fixed.

6 When these problems came up between Greg Glova and
7 Peter Baci, who came to the rescue? Glova and Baci
8 both testified that they elevated these issues to
9 their bosses. Glova turned to Serra and Baci turned
10 to Peake. Why? Because that was how the conspiracy
11 worked, that was the chain of command. The bosses
12 were the problem fixers in the conspiracy. That was
13 their role. And Greg Glova testified about the
14 bosses' role.

15 He was asked, "When Mr. Peake and Mr. Serra would
16 get involved, how would they help resolve things?"

17 "ANSWER: When it got elevated to Frank Peake and
18 Gabriel Serra, they would discuss it and come to some
19 kind of agreement together, when it would be elevated
20 and they would notify Mr. Baci and myself on what they
21 came to an agreement on and what they decided to do."

22 And Peter Baci, he testified to the same thing.
23 "We never had a price war. But occasionally we would
24 have a fire fight and would disagree on what was going
25 on between a particular customer, and a fire fight

1 would break out and we would try to put it behind us
2 as quickly as possible."

3 "QUESTION: How would you try to put it behind
4 you?"

5 "ANSWER: If it became a dispute, I would go to
6 Frank and ask him to become involved in it."

7 And Mr. Serra, he testified about his own role in
8 the conspiracy and how it was just like Frank Peake's.

9 "QUESTION: Did he, being Mr. Glova, also elevate
10 problems that he had with Mr. Baci to you?"

11 "ANSWER: Yes, he did."

12 "QUESTION: When Mr. Glova elevated those problems
13 to you, what would you do?"

14 "ANSWER: In most cases, I would discuss them or
15 communicate them with Frank."

16 And then there's Gabe Serra. Serra was in charge
17 of the Puerto Rico trade for Horizon. He had a lot of
18 responsibilities. He didn't care or have time to care
19 about every little detail of how the conspiracy ran on
20 a day-to-day basis. All he cared was that it was
21 getting done. And Serra testified that when there was
22 a problem, it got elevated from Mr. Glova to him, and
23 he stepped in, and he reached out, he reached out to
24 his friend, Frank Peake.

25 And we all heard how this worked. Remember the

1 phone call that we played where Glova elevated the
2 issue about Plaza Provisions, and Serra said, on the
3 phone, not to worry because he talked to Franky about
4 it. Serra and Peake already knew each other for
5 years. They were friends. They were friends when
6 they worked together at Horizon and friends when they
7 started working at different companies.

8 An there's nothing wrong with being friends. But,
9 because of this friendship, it was easy, easy for them
10 to talk, to talk about problems between Baci and
11 Glova, to talk about problems about the conspiracy.
12 And, like Serra, Frank Peake was also in charge of the
13 Puerto Rico trade. He was the president of Sea Star.

14 Think about that. The president of the company.
15 It doesn't make sense that the president would be
16 involved in all aspects of customers, all aspects of
17 pricing, all aspects of sales. In the same way, Frank
18 Peake wasn't involved in the day-to-day of the
19 conspiracy. But that doesn't mean he wasn't part of
20 the conspiracy.

21 You heard from three witnesses, three witness who
22 admitted to the conspiracy, admitted to their roles in
23 it. And these three witnesses all told that you Frank
24 Peake was right there in the conspiracy with them.
25 And these witnesses, along with all the documents you

1 saw, all told you that Frank Peake had a role. Not
2 the day-to-day role, but the role to step in when
3 necessary. Frank Peake, along with his friend, Gabe
4 Serra, were the problem fixers.

5 And here is another example of how the elevation
6 of problems worked in the chain of command. On
7 June 2nd, 2006, Glova complains to Peter Baci about
8 losing loads for the GSA account. And you heard that
9 the GSA account was a group of customers that included
10 General Electric or GE.

11 And a few days later, Glova sends another e-mail
12 to Baci and complains about losing business from the
13 Linden account. Days go by and he doesn't hear
14 anything. So what does Glova do? He elevates it. On
15 June 11th, Glova lets Serra know about the problem he
16 was having with Baci, about GSA and Linden. And on
17 the very next day, Serra and Peake have a six-minute
18 call. Later Glova sends another e-mail to Serra
19 reminding him of the GSA problem.

20 And Serra responds to Glova saying that he made a
21 call and was checking on it. He said this because he
22 had made the call to Frank Peake, and that same day
23 Frank Peake sends an e-mail to Baci to remind him to
24 talk about two accounts. Which two accounts? GE and
25 Linden. The same two accounts that were elevated from

1 Glova to Serra.

2 Then on June 13th Peake calls Serra twice, once
3 for a minute and then right after that an eight-minute
4 call. What do you think they talked about?

5 This shows the constant communication not only
6 between Baci and Glova, but also the chain of command,
7 how Glova and Baci kept their bosses informed of their
8 problems and issues between Serra and Peake, and how
9 they were resolved.

10 The defense told you that this case was about
11 insiders and outsiders. They told you that: Frank
12 Peake, he didn't have a secret gmail account. Frank
13 Peake, he didn't have a code name. Frank Peake, he
14 used his corporate e-mail account to communicate with
15 Horizon. But none of that makes him an outsider.

16 Do you remember someone else who didn't have a
17 secret e-mail account? Someone else who didn't have a
18 code name? Someone else who used his company's e-mail
19 to talk to competitors? That someone was Gabe Serra.

20 Was he an outsider? He told you about his
21 participation in the conspiracy. He told you that his
22 role and Peake's role were different than Baci and
23 Glova's. Serra and Peake, they didn't need to
24 communicate as much, they stepped in when necessary.
25 Yet Serra still told you that what he was doing was

1 wrong. He still told you that he was responsible. He
2 may not have discussed the conspiracy in every
3 conversation with Frank Peake, or even most of those
4 conversations, but it was enough. Enough for him to
5 know it was wrong.

6 If Frank Peake wasn't in the conspiracy, then what
7 was Serra doing in the conspiracy? Without Peake, who
8 did Serra work with to take care of the fire fights
9 between Glova and Baci? But with Peake, when Serra
10 needed someone to talk to, someone at Sea Star, about
11 problems with the conspiracy, he reached out to his
12 friend, his counter part in the conspiracy, the other
13 boss, Frank Peake.

14 Serra and Peake worked together for years. They
15 knew each other for years and they were close friends.
16 And together Peake and Serra made sure that those
17 little fire fights, those little fire fights between
18 Glova and Baci didn't turn into a war, a price war.

19 Does it make sense that Frank Peake was an
20 outsider? You heard all the testimony. Just like
21 Glova, just like Baci, just like Serra, Frank Peake
22 was on the inside.

23 And the second way that we know that Frank Peake
24 joined the conspiracy was through the Orlando meeting.
25 To show that Frank Peake was an insider you don't need

1 to look any further than the Orlando meeting, a
2 meeting attended only by four people: Baci, Glova,
3 Serra and Peake. A meeting of insiders. A meeting to
4 discuss the conspiracy.

5 How do we know? That's what every witness
6 testified about. But also let's look at what was
7 happening before and after the meeting.

8 The meeting took place on October 23rd and
9 October 24th, 2006. We know this not only through the
10 testimony, but through all the expense reports that
11 put the four people there. And here is Glova's
12 receipt that shows that Frank Peake made the lunch
13 reservation. And let's look at what was happening a
14 few days before. On October 10th, Glova e-mails Serra
15 about the meeting and they talk about what's going to
16 be discussed at the meeting. And then Serra and Glova
17 continues to swap e-mails about problem accounts.

18 And before the meeting, Glova gives Serra a list
19 of complaints he had with Baci over several customers,
20 his gripe list, complaints where he felt that Baci was
21 not following through on agreements. Agreements about
22 who should win the contract. Agreements on what
23 prices to charge the customers. Agreements that
24 competitors aren't allowed to make.

25 What is Glova doing here? He's elevating,

1 elevating problems to Gabe Serra. Problems that he
2 wanted Serra to talk about with Peake at the Orlando
3 meeting. Problems that needed fixing.

4 So on October 20th, 2006, just three days before
5 the Orlando meeting, Serra sent Peake a list, an
6 e-mail listing eight accounts that Glova told him were
7 problems, problems that needed to be discussed at the
8 meeting. And look at which two accounts are on this
9 list: GSA or GE, and Linden, the same two we just
10 finished talking about.

11 And what does Peake do five minutes later? He
12 responds with a list of six accounts that he wants to
13 discuss at the meeting. And this exchange between
14 Serra and Peake, this exchange of "Who Shot John" list
15 is exactly the type of communications that Glova and
16 Baci testified about, the ammunition that they would
17 give Serra and Peake to address the fire fights.

18 And Serra, when he took the stand, he told you
19 what this list was all about.

20 "QUESTION: What did you have with this
21 information of the list of accounts that Greg Glova
22 shared with you?"

23 "ANSWER: I believe I summarized to the ones I
24 thought were critical and sent them to Frank."

25 "QUESTION: And why did you send that information

1 to Frank Peake?"

2 "ANSWER: In our discussion we agreed that there
3 were a few accounts which we were concerned with,
4 their actions, and vice versa, they were concerned
5 with some of our actions on some other accounts."

6 THE COURT: A half an hour has elapsed.

7 MR. LEE: Thank you, Your Honor.

8 THE COURT: Okay.

9 MR. LEE: "QUESTION: What, if anything, did this
10 e-mail have to do with the Orlando meeting?"

11 "ANSWER: We were preparing for that meeting."

12 "QUESTION: To discuss these accounts?"

13 "ANSWER: Yes."

14 And that was one of the reasons for their Orlando
15 meeting. All three witnesses testified that they
16 planned to discuss some problems that Glova and Baci
17 were having. And these lists? These were like the
18 action items before a business meeting, items on the
19 agenda to discuss.

20 But there was another agenda item, and that was
21 the rate increases for the coming year. And in order
22 to make sure that everyone was literally on the same
23 page, Baci prepared a document called the 2007 Rate
24 Increase Plan, which he distributed at this meeting in
25 front of everyone.

1 And on October 25th, 2006, just one day after the
2 Orlando meeting, Glova asked Baci to send him an
3 electronic copy so the two of them could work out the
4 details. And a few days later, Baci sends it to
5 Glova.

6 And here is what the witnesses testified about the
7 rate plan. For Greg Glova.

8 "QUESTION: Now, during the course of the meeting
9 when you were talking about the rate plan, can you
10 just tell us who was present and who was involved in
11 the discussions?"

12 "ANSWER: Frank Peake, Peter Baci, Gabriel Serra,
13 and myself were all present and active in those
14 discussions."

15 When Peter Baci testified, he was asked, "What
16 agreements were reached regarding the 2007 rate plan
17 during that meeting?"

18 "ANSWER: In general terms, we reached an
19 agreement on this plan. Afterwards, there was some
20 back and forth on these items between myself and
21 Mr. Glova. In collective terms, this is what we
22 agreed to do for 2007."

23 "QUESTION: Who is the 'we'?"

24 "ANSWER: The four of us that were at the
25 meeting."

1 "QUESTION: Including Mr. Peake?"

2 "ANSWER: Yes, sir."

3 And Serra testified about the rate plan too.

4 "QUESTION: Did you discuss targets for rate
5 increases?"

6 "ANSWER: Yes."

7 "QUESTION: Was Mr. Peake present when this
8 document was distributed at the meeting?"

9 "ANSWER: Yes."

10 "QUESTION: What was the purpose of this?"

11 "ANSWER: So that we would put out similar
12 increases to the market, so that when we started
13 negotiating these contracts, we could negotiate along
14 the lines of these rate increases."

15 And this rate plan? That's price-fixing and
16 that's illegal. But the big agenda item, at least big
17 for Frank Peake at the Orlando meeting, was the
18 Florida 50/50 market share agreement. Not so much the
19 agreement itself, but the exceptions to the agreement,
20 especially the exception for refrigerated cargo or
21 reefers. Even before Mr. Peake joined Sea Star, the
22 companies had an agreement that they would split the
23 market between the fast ships, from Florida to Puerto
24 Rico, right down the middle, 50/50. Each company got
25 half the business. That way they didn't have to

1 compete for customers by offering better prices,
2 because they had already divided up the market share
3 and they had already agreed to raise prices.

4 But this 50/50 agreement had an exception. A big
5 exception for refrigerated cargo. And since reefers
6 weren't part of the 50/50, Horizon enjoyed a larger
7 market share than Sea Star did.

8 But Serra testified that Peake had a different
9 view of how that reefer market should be split. Peake
10 didn't think that reefer should be excluded from the
11 50/50. He didn't like that Horizon had a greater
12 share.

13 You see, reefer cargo was more profitable than the
14 other type of cargo. So Sea Star was missing out on
15 this additional revenue. So he did what he normally
16 did anytime he had a problem with Horizon, he reached
17 out to his friend, Gabriel Serra, and he complained to
18 them. And the two of them worked it out. They worked
19 it out in Orlando. As a compromise, Peake and Serra
20 agreed to change the exception to the 50/50 agreement.
21 They decided that Horizon could keep but not exceed
22 its current market share of the reefer market. And
23 this agreement between Frank Peake and Gabriel Serra
24 that changed the market share agreement for reefers,
25 is key because it not only shows that Frank Peake knew

1 about the 50/50 agreement and was involved in the
2 conspiracy, but here he is, putting his fingerprints
3 all over the agreement and making it his own.

4 Frank Peake wasn't passively going along with the
5 existing conspiracy. He was actively reshaping it and
6 expanding the scope of this illegal agreement,
7 eliminating more areas of competition.

8 And finally, another agenda item at the Orlando
9 meeting was the growth in Aqua Gulf's market share.

10 Aqua Gulf, as you heard, was both a customer and a
11 competitor. And there was a threat that their market
12 share was getting too big; that it was putting a
13 threat to the 50/50 balance. And we know that they
14 discussed Aqua Gulf at this meeting, not just from
15 Serra's testimony but also from the e-mail he sent
16 just a few days after the meeting, to the three other
17 people at the meeting after he had done his homework
18 and checked on the Aqua Gulf data.

19 And look what Serra says in this e-mail, an e-mail
20 to Baci, Glova and Frank Peake: Read and delete. Of
21 course. He knew this was inappropriate. He knew he
22 shouldn't send this to competitors. But the Orlando
23 meeting wasn't the only time that Frank Peake and Gabe
24 Serra got together to talk about the conspiracy.
25 Serra testified that they regularly met in San Juan

1 and Florida.

2 I want to talk about just two of those meetings
3 between Frank Peake and Gabe Serra. Now, you've heard
4 about several more, and they were good friends, they
5 got together every chance they could. And while most
6 of those conversation during those meetings may not
7 have anything to do with the conspiracy, we know that
8 sometimes they did discuss the conspiracy. And we
9 know they discussed it at these two meetings.

10 How do you know? Let's look at the e-mails before
11 these meetings between Baci and Frank Peake. Look at
12 what information Peter Baci was giving Frank Peake to
13 prepare him for these meetings with Serra.

14 First is the meeting in Ft. Lauderdale, Florida.
15 On August 19, 2005, Baci sends Peake a "Who Shot John"
16 list identifying problems he wanted Peake to raise
17 with Serra, in order to make sure that everything he
18 got back -- everything got back in line with the
19 conspiracy.

20 And as Baci testified, "You said that the 'Who
21 Shot John' list was typically prepared for what type
22 of occasions?"

23 "ANSWER: It was prepared for meetings that we
24 held between Frank Peake and Gabriel Serra, where they
25 would be discussing fire fighting activity."

1 And as you could see from the e-mail Gabe Serra
2 sent to Frank Peake, he was arriving in Ft. Lauderdale
3 the very next day and they were planning a meeting.

4 In the same way we know about a meeting at the
5 Condado hotel, a hotel right here in San Juan. Look
6 at this e-mail exchange between Frank Peake and
7 Gabriel Serra on May 31st, 2006, setting up the
8 meeting at the Condado hotel, a hotel where Frank
9 Peake was usually staying.

10 But how do we know this wasn't purely a social
11 meeting? Let's look at the e-mails right before this
12 meeting, between Frank Peake and Peter Baci, just one
13 day before. Frank Peake asked him to fax the market
14 share report. To where? The Condado hotel.

15 And what do you think they talked about during
16 that meeting between Gabe Serra and Frank Peake? And
17 the fact that this meeting took place in Puerto Rico
18 is important, because it is just one of the many
19 examples of an act in furtherance of the conspiracy
20 that took place in this district between 2005 and 2008
21 in order to satisfy the venue requirement.

22 Of course, this wasn't the only act in Puerto
23 Rico, as you saw several examples, including e-mails
24 and phone calls about the conspiracy, that Gabe Serra
25 sent from his office and his home right here in Puerto

1 Rico.

2 And the third way, the third way that Frank Peake
3 joined the conspiracy, was through the agreements of
4 the bunker fuel surcharge. During the time of the
5 conspiracy, fuel costs were on the rise and they were
6 cutting into the bottom line. And during the time of
7 the conspiracy these surcharges went up constantly.
8 They started adding up because they were charged on a
9 per container basis. And they raised prices
10 significantly.

11 You heard from Gabriel Lafitte from Burger King,
12 and he recalls this time well.

13 "QUESTION: Are you familiar with the bunker fuel
14 surcharges that were provided, that were implemented
15 by Sea Star and Horizon during that period?"

16 ANSWER: Yes."

17 QUESTION: And did they have any bunker fuel
18 surcharges during that period?"

19 ANSWER: During that time, certainly almost every
20 month the bunker fuel went up."

21 And the similar amounts and the similar timing
22 between the bunker fuel surcharges from Horizon and
23 Sea Star, that was no coincidence. Glova, Baci and
24 Serra all testified that one company couldn't have a
25 fuel surcharge in place without the other, because the

1 market share would shift.

2 So they made sure that those increases happened in
3 coordination every chance they could. Sometimes Glova
4 and Baci couldn't work it out on their own, so they
5 turned to Serra and Peake to get involved.

6 But Peake did more than agree with his friend Gabe
7 Serra on bunker fuel surcharges. He changed the way
8 they were applied to different routes, and he did this
9 but he didn't do it alone.

10 On April 27th, 2007, Horizon issued an
11 announcement to the trade that it was increasing its
12 bunker fuel surcharge effective May 14th, 2007, from
13 \$365 to 390. And Horizon was worried, worried because
14 after they issued the announcement, Sea Star didn't
15 immediately follow.

16 So who stepped in? Gabe Serra.

17 And who did he reach out to? Frank Peake.

18 On May 7th, 2007, Serra sends an e-mail to Peake,
19 to make sure he was watching the news about fuel
20 prices, to encourage him to file a surcharge matching
21 Horizon, just like he had done many times before. But
22 this wasn't their usual illegal exchange about bunker
23 fuel surcharge. This time Frank Peake suggests
24 charging different amounts for different ports of
25 origin. He challenges Serra to be more of an out-of-

1 the-box thinker. Peake wanted Serra to stop the
2 practice for the last 20 years of charging the same
3 amount of fuel surcharge regardless of the length of
4 the route.

5 And this discussion about differentiating fuel
6 surcharges gave Serra an idea: Rather than change the
7 amounts for different routes on the next increase,
8 like Peake wanted, Serra proposed it should be changed
9 on the next decrease. So after e-mailing Glova about
10 the idea, he e-mails Frank Peake to set up a call, and
11 they have one, just a few minutes after this e-mail,
12 lasting for 10 minutes.

13 Meanwhile, Greg Glova and Peter Baci, they are
14 keeping tabs on what their bosses were doing and
15 getting ready to do the dirty work. Later that same
16 morning, Glova wrote to Baci asking if Sea Star was
17 willing to match a fuel surcharge increase.

18 And Baci replies, "Frank and Gabe spoke last
19 night, and as a result, Sea Star would not only match
20 Horizon's fuel surcharge this time, but they should
21 plan on how to charge different amounts for longer
22 routes. Just like Peake wanted. And you could see by
23 these announcements, that's exactly what happened.

24 First, Sea Star matched the bunker fuel surcharge
25 for Horizon for that particular time, just like they

1 had many other times. And then in a later
2 announcement you see that both Sea Star and Horizon
3 not only charged the same amounts for Florida, but now
4 they charged higher amounts for the longer routes.
5 Just like Peake wanted.

6 And we know this was Peake's idea from the
7 testimony. As Glova said. "As between Sea Star and
8 Horizon, whose idea was it to charge the higher fuel
9 surcharge on the longer routes?"

10 ANSWER: It was Sea Star's idea."

11 QUESTION: Who at Sea Star was the main advocate
12 or proponent for that agreement?"

13 "ANSWER: Frank Peake."

14 And Gabe Serra said,

15 "QUESTION: Whose idea was it to charge different
16 rates for the different routes?"

17 "ANSWER: To me, it began by Frank."

18 "QUESTION. Did have you discussions with Mr.
19 Peake about different surcharges for different
20 routes?"

21 "ANSWER: Yes, we did."

22 The coordination between Horizon and Sea Star over
23 bunker fuel surcharges, that's what makes it a crime.
24 It is not an excuse they coordinated the surcharge
25 because the price of fuel was going up or the

1 companies had agreed a certain amount to recover the
2 cost, or that it even made sense to coordinate them
3 because longer routes burned more fuel.

4 Frank Peake could have done it the right way. He
5 could have issued his surcharges when he thought he
6 needed to without talking to Horizon. He could have
7 changed the way the surcharges were applied to longer
8 routes without getting Serra's agreement, but he
9 didn't, because he knew that if his company had a
10 higher fuel surcharge than Horizon, he would lose
11 customers because fuel surcharge was a component of
12 price. And once you agree with a competitor about a
13 surcharge, about the amount and timing, it's a crime.

14 THE COURT: Forty-five minutes have elapsed.

15 MR. LEE: Thank you, Your Honor.

16 Frank Peake committed the crime of price-fixing,
17 because he couldn't risk losing customers, he couldn't
18 risk prices coming down. Because as president of the
19 company, Frank Peake was responsible, responsible for
20 the profitability of Sea Star. And, as you heard from
21 Peter Baci, before the conspiracy started Sea Star
22 never made a profit. Baci never received a bonus.

23 "Before the conspiracy began in 2002, had Sea Star
24 ever been a profitable company?"

25 "ANSWER: No, sir."

1 "QUESTION: Was it profitable during the
2 conspiracy?"

3 "ANSWER: It was not profitable in 2002. It was
4 profitable in 2003 and beyond."

5 "QUESTION. Had you ever received a bonus at Sea
6 Star before the company became profitable in 2003?"

7 "ANSWER: No, sir."

8 "QUESTION. Did you receive bonuses after the
9 company became profitable in 2003?"

10 "ANSWER: I did."

11 "QUESTION: In what years?"

12 "ANSWER: 2003, 2004, 2005, all the way through."

13 And Frank Peake knew this. So in order to make
14 Sea Star profitable, in order to keep her profitable,
15 Frank Peake joined the price-fixing conspiracy, and he
16 stayed in until the end. And it worked. Sea Star
17 became profitable. Of course, all companies, they
18 want to make a profit, and presidents of those
19 companies should try to make their company profitable.
20 But there's a legal way to do it and there's a wrong
21 way to do it. And the wrong way is how Frank Peake
22 did it. Because of the conspiracy, Sea Star made
23 money, and Frank Peake reaped the benefits. He got
24 huge bonuses, bonuses that were tied to Sea Star's
25 profits. And you can look at how these bonuses are

1 calculated by looking at Government's Exhibit 93.
2 Bonuses on top of a six-figure salary, every year
3 during the conspiracy.

4 Of course, there's nothing wrong with big salaries
5 and there's nothing wrong with big bonuses, but there
6 is something wrong when that money is being made by
7 fixing prices and cheating customers.

8 Frank Peake, he didn't start the conspiracy, but
9 it doesn't matter, he's still responsible for joining
10 the conspiracy for all the years he was in it. And
11 anyone who joins a conspiracy breaks the law. It
12 doesn't matter if you're the first ones in, like Glova
13 and Serra, or the last one through the door -- I'm
14 sorry, first ones in like Baci and Serra, or the last
15 one through the door, like Glova. Once you're in,
16 you're in. Frank Peake, he may not have started the
17 fire, but he had every opportunity to put it out. He
18 was the president of Sea Star. If he had ordered
19 Peter Baci to stop communicating with Horizon, the
20 conspiracy would have been over. But he didn't.
21 Instead, he supported Baci and stepped in to fix
22 problems he had with Glova. If Frank Peake refused to
23 conspire with his friend Serra, the conspiracy would
24 have been over. But he didn't. Instead, they got
25 together to work out the problems.

1 If Frank Peake allowed Sea Star to really compete,
2 Horizon would also have to really compete, and the
3 conspiracy would have been over. But he didn't.

4 And at no time did Frank Peake try to put out the
5 fire. Instead, he tended the flames, time and time
6 again, fixing problems between Baci and Glova,
7 participating in the Orlando meeting, coordinating the
8 bunker fuel surcharge.

9 When you go back in that jury room and you
10 consider all the evidence you've seen in this trial,
11 the testimony of three eyewitnesses identifying Frank
12 Peake's involvement in the conspiracy, the documents
13 that all show Frank Peake's role as a price-fixer,
14 think about it all. Ask yourself: Does it make sense
15 that Frank Peake wasn't involved?

16 Don't allow Frank Peake to let his friends and
17 coworkers take the fall for what he knows and you know
18 he did.

19 Frank Peake was in a powerful position, and he
20 seized every advantage to raise prices, making it easy
21 for him to cheat his customers, easy for him to
22 conspire with his friends, easy for him to join the
23 conspiracy.

24 All the evidence in this case, all the witness'
25 testimony, all the e-mails, lead you to find that

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1 defendant Frank Peake is guilty.

2 Thank you.

3 THE COURT: Fifty-five minutes elapsed.

4 The Court made a mistake, only 50 minutes elapsed.
5 He started at 10:14 and he stopped at 11:04, so 50
6 minutes elapsed.

7 Now, the defense is entitled to an hour-and-a-
8 half. They may divide it appropriately. They have
9 been authorized to both use time, and it is not the
10 Court's liking to fraction the testimony, but the
11 Court will allow the defense to decide when they ought
12 to stop, if they ought to stop, and considering that
13 the Court's policy is that at one-hour-and-a-half, the
14 Court usually gives the jury a break.

15 But it is up to you to decide, if you want to stop
16 at an appropriate time, you may do so.

17 All right?

18 MS. MOSS: May it please the Court?

19 THE COURT: Yes, Ms. Moss.

CLOSING ARGUMENT

20
21 MS. MOSS: Ladies and gentlemen --

22 THE COURT: 11:09.

23 MS. MOSS: It's 11:09.

24 I stood before you at the beginning of this case
25 and I told you that Frank Peake is innocent. Now I

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1 stand before you at the end of this case, after nine
2 days of long testimony, and nothing has changed.
3 Frank Peake is innocent.

4 Before I go on, I just want to tell you, my heart
5 is racing now and I am nervous, because for the last
6 nine days I've had Mr. Peake's life weighing down on
7 my shoulders. For the last 13 months, Mr. Marks and I
8 have had Mr. Peake's life weighing down on our
9 shoulders. I apologize for being nervous. And I
10 don't have any fancy charts to show you or PowerPoint
11 presentations. I'm just going to talk to you.

12 Mr. Lee spoke in his closing argument about what
13 the Government has to prove. And I'm going to talk to
14 you about proof, because when the Government brings a
15 case, charges a person with a crime, indicts a person
16 with a crime, they have to prove their case before you
17 can ever convict someone. They have to bring you
18 evidence. They have to give you tools in order to
19 decide the case. They have to bring you proof. Not
20 just any proof, not just any evidence. They have to
21 bring you reliable, credible, unbiased evidence so
22 that you can make a decision in this case.

23 But what have they brought to you in this case?
24 What have they proved to you in this case? I submit
25 it's nothing. They've given you nothing to show you

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1 that Frank Peake was involved in this conspiracy.

2 And some of you may be saying, well, what about --
3 Mr. Lee just stood up here for 50 minutes, what about
4 everything that he said? Well, that's not evidence.
5 We have to look at the evidence that you heard during
6 the trial. And instead of bringing you reliable,
7 credible unbiased evidence, what did they show you?

8 Instead of bringing you proof, they relied on the
9 testimony of three criminals, three *chotas*, three
10 snitches, and these witnesses presenting themselves to
11 you with the confidence that they would not be
12 doubted, with the confidence that you would just take
13 whatever they had to say and believe it.

14 But remember what I told you in my opening
15 statement? That just because they say it's so,
16 doesn't make it so. Just because they say it, doesn't
17 mean that it's the truth.

18 The Judge is going to tell you witnesses,
19 particularly Government cooperators, are not presumed
20 truthful. They're not presumed honest. They are not
21 presumed credible. And the Judge is going to read you
22 a warning in a little while when he reads you the
23 instructions about the law, and he's going to tell you
24 that these people here, Baci, Gabriel Serra, Gregory
25 Glova, these people have a reason to make up stories

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1 and to exaggerate their testimony because they wanted
2 to help themselves.

3 And, frankly, if your priest had gotten up on the
4 stand or Judge Dominguez had gotten up on the stand
5 and testified and said all those things about Frank,
6 I'd be cringing the whole time. I would have crawled
7 underneath the table.

8 But that's not what we had here. We had three
9 biased, prejudiced witnesses who had gotten huge
10 benefits from the Government. That's what you heard
11 from.

12 I did not crawl under that table. I stand up here
13 honored to represent Frank Peake, because I know and
14 you know these people lied, that they are liars and
15 that they lied for years. They got really good at
16 lying. They got really good at deceiving. They got
17 really good at keeping secrets.

18 But the truth? We didn't hear that here. Now,
19 unfortunately, I don't have the pleasure and the luck
20 to be able to practice here in Puerto Rico in front of
21 Judge Dominguez all the time. I practice in Miami.
22 Not so bad. And in Miami, in all of our courtrooms,
23 every single courtroom, there's a sign, it stands
24 above the Judge's head, and what that sign says, and
25 it exists here also, is that "We who labor here seek

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1 only the truth." We who work and toil in this
2 courtroom seek only the truth.

3 So what is the truth here? Well, I'm sure you've
4 all heard of an old saying, an old saying called "the
5 devil is in the details." The devil is in the
6 details. And I was thinking about this saying last
7 night, as I was thinking about this moment that I was
8 going to come before you. I was reminded of something
9 that had happened when I was in law school, when I was
10 in law school one semester when I was preparing for
11 final exams.

12 And in law school final exams are a big thing,
13 because that final exam that you take at the end of
14 the semester, that is your entire grade. Everything
15 that you did before that, the rest of the semester, it
16 doesn't matter; it's that one exam.

17 Now, we were getting ready for final exams. And
18 there were two guys in my class, two guys in my class
19 who had studied really hard all semester, who had read
20 the law, who knew all the cases. So the weekend
21 before the exam -- the exam was early Monday morning
22 at 9:00. The weekend before the exam, they said:
23 We're going to go out of town, we're going to go to
24 Tampa. We're going to have a good time, we're just
25 going to relax. So they went out of town, they went

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1 to Tampa. They partied, they relaxed, they had a good
2 time. They said, we'll go back on Sunday afternoon,
3 we'll get back in time, we'll be fine for the exam.

4 Sunday afternoon rolls along, and they're saying:
5 We're still having a good time, you know, we're going
6 to stay a little bit longer, you know, we'll get up
7 really early on Monday morning and we'll drive back to
8 Miami and we'll take the exam. Monday morning comes
9 and they overslept. They missed the exam.

10 So what do they say in their mind? Oh, my gosh.
11 Oh, my gosh. What are we going to say? They say, okay,
12 we're going to tell the professor we had a flat tire and
13 that's why we couldn't make it back in time for the exam,
14 we'll tell him we had a flat tire.

15 They go back to Miami, they make it back
16 eventually. The next day, they said, "Professor, please,
17 we had a flat tire, can we please take the exam now?"

18 The professor thinks, "Sure, you can take the
19 exam. Come in tomorrow morning, I'll give you the exam."

20 They come in to take the exam. They have to sit
21 apart. That's the way we did it in law school. They had
22 their test booklet. They opened up the test booklet. As
23 they're seated away from each other, they read the exam,
24 and there's one question on the exam. The question is:
25 Which tire?

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1 The devil is in the details. It's easy to tell
2 the big lie. It's easy to say, oh, Frank Peake was
3 involved, Frank Peake knew all about it, Frank Peake
4 participated. But the truth is in the details. The truth
5 is in the details.

6 And if you asked each one of these criminals on
7 the stand, you know, "Who were all the people involved in
8 this conspiracy? What was the goal of the conspiracy?
9 What was discussed at these so-called conspiratorial
10 meetings?" They would each give you a different answer.
11 And they each did give you a different answer because the
12 truth is in the details.

13 Now, there was testimony about three meetings that
14 took place. And Mr. Lee spoke a little bit about the
15 meetings and showed you a little bit of pieces of testimony
16 from some of those meetings. But let's talk about the
17 details of what these people testified to, because these
18 are the meetings -- and I believe what Mr. Lee said is, "If
19 you want to know that Frank Peake is an insider, you'll
20 look no further than these meetings."

21 What did Gregory Glova say about these meetings,
22 about the four of them getting together? He said there
23 were two meetings. There was a meeting in Orlando. We
24 know they got together in Orlando. Of course they got
25 together in Orlando. That there was a meeting a year later

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1 in Orlando again.

2 What did Peter Baci say about these meetings? He
3 said there was a meeting in Orlando, October 2006, and he
4 said that a year later there was a meeting at a world golf
5 village, and what he put on his expense report was
6 Jacksonville International Airport.

7 What did Gabe Serra say? Gabe Serra said there
8 was one meeting, one meeting in Orlando. He didn't say
9 there were two meetings. He didn't say there was another
10 second meeting. He said there was one meeting.

11 So when you start getting deeper and deeper into
12 the details, you see. And what was discussed at this
13 meeting, the first meeting? Well, Mr. Lee picked and chose
14 some of that testimony where they talked about a 2007 plan.
15 And, of course, the witnesses are going to talk about a
16 2007 plan because there was an e-mail that Peter Baci sent
17 to Greg Glova about this 2007 plan. Not to Frank Peake.

18 So they talked about this 2007 plan. But what
19 else did Greg Glova say? He said they talked about
20 undercutting of rates. Sea Star undercutting Horizon,
21 Horizon undercutting Sea Star.

22 What did Peter Baci say? Peter Baci said there
23 was no talk about undercutting of rates. We talked about
24 excluding -- getting rid of that exception to the 50/50
25 rule, the reefer rule. That's what he said.

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1 Now, Mr. Glova didn't mention anything about that,
2 getting rid of that exception to the 50/50 rule. He didn't
3 say that was discussed. That was Peter Baci. And what did
4 Gabe Serra say was discussed? He didn't talk about a 50/50
5 rule. He didn't really hardly talk about this 2007 plan.
6 He said that the market -- they talked about the market and
7 that they were going to freeze Horizon's market share at
8 52 percent.

9 When you ask them about the details of the
10 meeting, how many meetings, who led the meetings, what was
11 discussed at the meetings, that's when you get down to the
12 details; the truth.

13 And the most important meeting of all, the one
14 that was never even mentioned by Mr. Lee, one that Peter
15 Baci testified about in April of 2002, when this conspiracy
16 was hatched, when this conspiracy was born, a meeting that
17 Frank Peake was nowhere near, that's when Peter Baci says
18 that this conspiracy started.

19 What did Gabriel Serra say about when this
20 conspiracy started? He said June 2003.

21 MR. SNYDER: Objection. Misstates testimony, Your
22 Honor.

23 THE COURT: Thank you. If it does, it will be up
24 to the jury to make that determination.

25 MS. MOSS: And you will be able to rely on what

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1 you heard in that witness stand. They didn't show it
2 to you in their chart, in their closing. Gabriel
3 Serra said that that conspiracy was hatched in June of
4 2003.

5 You have to keep digging down and digging down in
6 order to get to the details. And when you dig all the
7 way down, you find the truth, that Frank Peake was not
8 involved.

9 And speaking more about details, let me talk a
10 little bit about one of the witnesses, Gregory Glova.
11 Gregory Glova was the first witness, you remember, on
12 the stand. The witness who spent more time on the
13 stand than anybody else. The Government's star
14 witness who explained and laid out everything for you.

15 And what did he say on cross-examination? He
16 said, "I'm sorry, I don't remember the details."

17 What about how he testified? And this is very
18 important because the Judge is going to tell you, you
19 decide which witnesses to believe and not believe.
20 And you do this by taking into consideration a
21 witness' conduct and a witness' demeanor. How did
22 Gregory Glova testify? What was his demeanor like on
23 the stand?

24 You remember him on direct; it was like a script.
25 The prosecutor asked him a question. He said, yes,

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1 *sir, he said, no, sir. He knew all the documents. He*
2 *responded immediately.*

3 *What about, how was he on cross? He was angry.*
4 *He was combative. He wouldn't answer Mr. Markus'*
5 *questions. And when he gave him a document to look*
6 *at, do you remember how he sat there for two, three*
7 *minutes reading an e-mail that was about 10 lines*
8 *long? Thinking, thinking in his mind what am I going*
9 *to say? How am I going to answer this question? What*
10 *am I going to do?*

11 *How did he testify? Was he credible? No. I go*
12 *back to that sign that's in the Miami courtrooms, "We*
13 *who labor here seek only the truth." Truth. That's*
14 *not what you heard from Gregory Glova.*

15 *There's another very important point to that sign.*
16 *We who labor here, we who toil and work here, seek*
17 *only the truth. And that important point is that it's*
18 *the whole truth, the whole truth.*

19 *Do you think you have heard the whole truth in*
20 *this trial? Do you think that you have been given all*
21 *of the evidence in this trial? And remember, it's the*
22 *prosecutors who have the burden in this case. The*
23 *prosecutors who were required to give you all the*
24 *evidence so that you can determine what is the truth.*
25 *I'm sure the prosecutor is going to say that "we can*

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1 pick and choose and decide what evidence we want to
2 present to you, what witnesses we want to provide to
3 you." But where is the truth? At the heart of it,
4 there has to be truth.

5 Why did we have to show you the pages upon pages
6 upon pages of Peter Baci's diary? Remember his
7 notebook where he wrote notes on the conspiracy? He
8 wrote notes on work. He wrote notes on senior
9 management meetings. He took detailed notes for 10
10 years until he had 29 notebooks full of information.
11 And he testified, "I wrote notes about the conspiracy
12 meetings, I wrote notes about what happened in
13 Orlando."

14 Why did we have to show you Peter Baci's notebook?
15 Why did we have to show you the stacks of e-mails that
16 we introduced if the Government is trying to give you
17 the whole truth? Why did we have to tell you Gregory
18 Glova was keeping a calendar and keeping notes on a
19 calendar?

20 The prosecutors in this case have tailored their
21 evidence, tailored their questions. Remember what
22 Gabriel Serra said on the stand? They asked me a very
23 specific question because they practiced it. They
24 tailored their evidence. Shame on them. They're
25 supposed to bring you the truth.

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1 Where is the F.B.I. agent who interviewed Gregory
2 Glova?

3 Where is the F.B.I. agent who interviewed Peter
4 Baci and who interviewed Gabriel Serra?

5 Where are the 29 notebooks of conspiracy notes
6 that Peter Baci said he kept? Where are Greg Glova's
7 calendar notes on this conspiracy? Where is Kevin
8 Gill? Where is Alex Chisholm? Where is Bill
9 Stallings? You haven't heard the whole truth.

10 And you know where you would find the truth in
11 this case? Not from what they say on the stand today,
12 after they've gotten their benefits, after they've
13 gotten their deals, after they've pointed their
14 fingers. To find the truth, you would have to look at
15 what was going on at that time. What did Peter Baci
16 write in that notebook about what happened at the
17 Orlando meeting before he had a reason to be biased,
18 before he had a reason to bow down to the prosecutors?

19 You heard questions in this trial about Mr. Glova,
20 Mr. Serra saying different things to the agent than
21 what they testified to today. How would you know what
22 the truth is? Ask the agent. Ask the unbiased
23 professional law enforcement official who questioned
24 these people, who wrote reports that you've heard
25 about, who got the statements from them that you have

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1 never seen.

2 Why don't you have that evidence? Because that's
3 where the truth is. That's what the Government didn't
4 bring you. And all of those things equal a reasonable
5 doubt.

6 The Government is supposed to prove their case
7 beyond and to the exclusion of every reasonable doubt.
8 These are not just words. You know, if you were
9 involved in a civil case, a civil case where you were
10 suing someone for money because maybe they hit you
11 with their car, there's different levels of proof in a
12 civil case. All you have to prove is what's called a
13 preponderance of the evidence. And the Judge showed
14 us at the beginning, all you have to do is -- you have
15 a set of scales, you have to just ever so slightly
16 shift those scales more likely than not. That's how
17 you prove the case in a civil matter.

18 If the State wanted to take your children away,
19 there's a different level of proof. They would have
20 to prove by clear and convincing evidence that someone
21 was a danger to their children. A much heavier
22 shifting of the scales because there's a heavier level
23 of proof.

24 But this is a criminal case, and in a criminal
25 case we have the highest level of proof that exists in

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1 the law: Beyond and to the exclusion of every
2 reasonable doubt. It's not a shifting of the scales
3 or a heavier tipping of the scales, shifting the
4 scales all the way.

5 MR. SNYDER: Objection, Your Honor.

6 MS. MOSS: That's how much --

7 MR. SNYDER: Misstates the instruction.

8 MS. MOSS: -- beyond --

9 THE COURT: The Court will be providing an
10 instruction on reasonable doubt, which may or may not
11 supersede the argument. This is argument, all right?

12 Go ahead. You may continue.

13 MS. MOSS: This is not a civil case. This is not
14 a tipping of the scales. This is not a family case.

15 This is a criminal case. Beyond and to the
16 exclusion of every reasonable doubt. Because this is
17 a criminal case, it's not money that's at stake here;
18 it's somebody's life that is at stake here, and that's
19 why we take this so seriously, as I'm sure that you
20 will.

21 And in this case, the State has not proved -- the
22 Government has not proved its case beyond and to the
23 exclusion of every reasonable doubt because they
24 couldn't, because Frank Peake is not guilty.

25 Mr. Markus is also going to be speaking with you,

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1 and he's going to be sharing a little bit more about
2 the documents and about the witnesses, but I thank you
3 for being so patient with us during this trial. I
4 know it's been a long trial and you've been great.

5 Please continue to take this as seriously as we
6 know you are, and believe that Frank Peake is not
7 guilty.

8 THE COURT: 11:35, 26 minutes elapsed.

9 Does the defense wish to recess now or wish to
10 start?

11 MR. MARKUS: I think it's a good time to take a
12 break.

13 THE COURT: Okay. The Court respects that and
14 therefore provides the jury a 15-minute break at this
15 time.

16 THE DEPUTY MARSHAL: All rise.

17 (Whereupon a recess was taken.)

18 THE COURT: They all agree that we should at this
19 time break and let the jury have their lunch,
20 including the defendant; is that right, Mr. Peake?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: Okay.

23 (Whereupon the lunch recess was taken.)
24

CLOSING ARGUMENT
25

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1 MR. MARKUS: Thank you, Your Honor. May it please
2 the Court.

3 THE COURT: Yes, sir.

4 MR. MARKUS: This is Frank Peake, ladies and
5 gentlemen, and he is innocent.

6 Good afternoon, everybody. I hope everybody had a
7 nice lunch. They stick me right after lunch.
8 Everybody wants a nap. Me too. So I'm going to try
9 to get through this as quickly as I can and go through
10 the evidence and what this case is about.

11 But I've been waiting a long time to say it, so
12 let me say it one more time: Frank Peake is innocent.
13 And I do agree with one thing that Mr. Lee said. This
14 case is about that second element, right? We all know
15 there was a conspiracy. We all know about those
16 secret e-mails and everything else.

17 This case is about whether Frank Peake knowingly
18 joined that conspiracy. That's what this is all
19 about.

20 And I think one other way that Mr. Lee framed the
21 issue that I agree with is: Did Mr. Peake compete or
22 did he cheat? Was he a fighter or was he a cheater?
23 And I think when we go through the evidence now,
24 you're going to see and agree with me that he is a
25 fighter, he's not a cheater.

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1 You know, ladies and gentlemen, Mark Twain once
2 said that a lie travels halfway around the world
3 before the truth can put its pants on in the morning.
4 We heard a lot of lies up there on the stand. A lot.
5 And you saw them.

6 But, you know, each of those three witnesses had a
7 moment of truth; a moment of truth before they could
8 come up with their stories, before they could offer
9 them any benefits or deals or get-out-of-jail-free
10 cards. They had a moment of truth.

11 Remember Peter Baci? His moment of truth was he
12 landed on the plane, his wife called him and said,
13 "The F.B.I. is at the house." Remember? And he said
14 that was the most frightening moment of my life.

15 So what did he do in that moment of truth? Did he
16 call the problem fixer, as Mr. Lee said? Mr. Lee said
17 that Mr. Peake was the problem solver, the fixer. Did
18 Mr. Baci call the problem solver? No.

19 Who did Mr. Baci call? He called a man named Alex
20 Chisholm and he told that man to delete the gmail
21 account.

22 Now, if Mr. Peake was this problem solver, he was
23 the fixer of the conspiracy, who would Mr. Baci have
24 called in that moment of truth? He would have called
25 Mr. Peake. But he didn't. He didn't even speak to

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1 Mr. Peake until he got back to Jacksonville. No calls
2 to the supposed fixer. Moment of truth number one for
3 their witness.

4 Moment of truth number two: Gabriel Serra. He's
5 driving in. He hears the F.B.I. is at the office.
6 What does he do? He looks them right in the eye for
7 an hour and he lies.

8 Not just lying to anybody, but lying to the F.B.I.
9 for an hour. That's longer than Mr. Lee spoke in his
10 closing statement. And that was a long time. And he
11 looked them right in the eye and he lied. It takes a
12 special kind of person to do that, ladies and
13 gentlemen, a special kind of person.

14 You know, when I used to get called to the
15 principal's office in elementary school, I walked in
16 and I cracked like that (gesturing), you know. Forget
17 about the F.B.I.

18 The third moment of truth for their third
19 witness -- by the way, before I get to Glova, you
20 know, Serra got up on the stand, he says: Well, now I
21 want to tell the truth. Now I do. And I'm friends
22 with Mr. Peake and I'm just telling the truth. He had
23 his lawyer in the front row objecting to questions.
24 He wouldn't speak to us.

25 When the truth is on your side, you have nothing

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1 to hide, you speak to everybody. You tell it like it
2 is. He didn't speak to us. And the Judge is going to
3 say -- he's going to instruct you, Judge Dominguez,
4 that there's absolutely nothing wrong with being
5 interviewed. And, yet, this man who says that he was
6 telling the truth, wouldn't even speak to us? Ask
7 yourselves why.

8 Greg Glova, the third moment of truth. He's
9 interviewed by the F.B.I. He mentioned 16 people.
10 Not one of them Frank Peake. And how do we know that?
11 How do we know that? Because they wrote out a
12 statement for him. We went line by line on that
13 statement, and he made changes, over 20 changes to
14 that statement.

15 I wrote down some of them, things he talked about
16 in his statement. When he began working in the
17 conspiracy -- I'll just take this off and go through
18 it. You know what, I'll just read it to you, you
19 don't want to look at the screen anyway. I'm all
20 Elmo'd out for now, we'll get to some documents.

21 He talked about Gabe Serra promoting him. He
22 changed the date; remember that? He talked about
23 Kevin Gill. He made sure to change that he didn't
24 know about the conspiracy when he started in that
25 position. Do you remember he crossed that out? He

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1 said he went along with Gill and Serra, and that's the
2 way it was done and he was just following orders. He
3 explained why he participated. He talked about Sea
4 Star. He talked about Crowley. He talked about
5 secret e-mails and his cellular phone. He talked
6 about pricing. He talked about market share. He
7 talked about Walgreens and Wal-Mart and bunker fuel
8 surcharge, about how they were just recovering costs.
9 He spoke about Peter Baci, Gabe Serra and Kevin Gill.
10 And he made sure to add in another person, Tom Farmer.

11 But he didn't add Frank Peake in that moment of
12 truth.

13 He talked about justification, and he signed that
14 statement and it was witnessed by two F.B.I. agents.

15 So we see for each of them what happened in their
16 moment of truth. No Frank Peake. No Frank Peake.

17 And I'd like to start off with an e-mail that
18 Mr. Lee didn't mention in his closing, but it was put
19 up on the screen in opening statement by Mr. Snyder.
20 And Mr. Snyder showed you a portion of this e-mail.
21 It's prosecution Exhibit 37. And I think this e-mail
22 really, in a lot of ways, is the key to this case. In
23 A lot of ways, it is the key to this case, because you
24 look at what they showed you in opening and it looks
25 so bad, but then when you read the top, you see what

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1 this case is all about.

2 So I'll try the Elmo one more time and we'll go
3 through this.

4 THE COURT: I think it's working.

5 MR. MARKUS: Yeah, it's me; it's not the Elmo.

6 So you all remember this e-mail; remember the PNW?
7 Mr. Peake was e-mailing Mr. Serra and saying, "You may
8 have a visitor, no mistakes."

9 And Serra writes back, "Don't worry."

10 And Peake says, "I don't want it to be close."

11 And Serra says, "Do you have any doubt we'll hold
12 the line?"

13 "No doubts, just making sure."

14 Now, you look at that e-mail and you say, my
15 goodness, there must be a conspiracy here. Look at
16 these guys talking about not bidding against each
17 other, right? It looks bad.

18 In opening statement, Mr. Snyder showed you this
19 part. And then Ms. Moss had to get up and show you
20 the top, the very top of the e-mail. What happens?
21 Mr. Serra forwards it to Kevin Gill and he says: B.S.
22 big time. B.S. big time.

23 And that's really, in a lot of ways, the key,
24 ladies and gentlemen, because these two guys were
25 poking each other in the chest, B.S.ing each other and

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1 going after each other.

2 And how do we know that? Because on that e-mail
3 where they're discussing holding the line on that
4 Transconex customer, we see another e-mail in
5 prosecution Exhibit 44, where Kevin Gill sends an
6 e-mail to Gabe Serra, and he says, "Just to keep you
7 up to date, Transconex is being watched like a hawk by
8 Sea Star. They're having their salespeople go by each
9 facility several times a day."

10 And they go on to talk about how Sea Star is going
11 to take actions based on any excuse, and there's a
12 point in each competitive marketplace where the rules
13 get thrown out.

14 And so what happens, does Mr. Serra hold the line?
15 Remember, I asked him, "Did you hold the line?" He
16 said, "No, I took a piece of the business."

17 And I had to press him. Remember, he tried to
18 fudge there? I said, "You took all of Sea Star's
19 business after you said you'd hold the line." He
20 said, "Yeah, actually, I took all of it. I took all
21 of it."

22 And so what happens after they take all of it?
23 Frank Peake writes an e-mail saying: Looks like we
24 have paybacks to give. This is about the Transconex
25 business. I would like to hear your ideas on a

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1 suitable slap.

2 Here's Frank Peake saying we're going to go after
3 them, because Frank Peake competes. He doesn't cheat.
4 And that's a perfect example.

5 And, you know, when you talk about old time
6 friends and rivals and competitors, sometimes you've
7 got to look at the whole e-mail, not just half, to see
8 what's going on.

9 You know, I still like to play basketball. I'm
10 getting up there, but I like to run around on the
11 basketball court. And sometimes I like to go out, I'm
12 from Miami too and I go to the University of Miami and
13 I play with the young college kids. And they laugh at
14 me when they see me; who wouldn't, right?

15 And I say, look, I'm getting old, take it easy on
16 me. That's what I tell them. And they pat me on the
17 back. And the first time I get the ball, I drive by
18 them as quick as I can, because I'm just giving them a
19 story, to try so I can beat them. Now, they learn the
20 next time that I actually have a little bit of a step
21 left; not much, but a little.

22 And that's what happens when you're competing.
23 There's a lot of trash talk that goes on. You can't
24 just read the words on the page and say, aha, we can
25 tell you what that means.

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1 Human beings are more complicated than that. And
2 so I think that Transconex deal really is a good
3 example of this case in general.

4 Now, I too can't go through every single e-mail
5 that we've seen in this case. But none of these
6 e-mails are a problem. And I'm going to try to take
7 the ones that were focused on and go through them with
8 you.

9 But let me just make a point about e-mails for a
10 second. I think you heard what the F.B.I. did in this
11 case, ladies and gentlemen. They went through every
12 paper, every e-mail, every desk drawer in everybody's
13 offices, and they went through it and through it and
14 through it with a mindset that Frank was guilty.

15 MR. SNYDER: Objection, Your Honor. There is no
16 evidence in the record to support that.

17 THE COURT: Okay. Fine. You may, at your turn,
18 proceed and argue to the contrary.

19 MR. MARKUS: Ladies and gentlemen, you heard, they
20 went through every piece of paper. Peter Baci's
21 office was barren. And they took all those notebooks;
22 remember?

23 Imagine the F.B.I. going through all of our
24 papers, all of the e-mails we've ever written in our
25 life and trying to spin them. You know, my

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1 grandfather told me a story once. He said there's a
2 way to look at life, you can look at life through
3 clean windows or you can look at life through dirty
4 windows.

5 And if you look at life through dirty windows,
6 everything looks bad, everything looks evil,
7 everything looks dirty, right? He said, "Son, I want
8 you to look at life through clean windows so you can
9 judge for yourself what's good and what's evil."

10 And that's why we have you all, the jury. Because
11 they've looked at these e-mails through dirty windows,
12 ladies and gentlemen. That's how they have proceeded
13 with these e-mails.

14 They assume the worst in people. They assume
15 those e-mails mean something that they don't. And so
16 we have you all to look at those e-mails through clean
17 windows, and you all can decide for yourselves what
18 they mean.

19 And so let's go through some of them and see if
20 they really mean what the prosecutor says they do.

21 Remember this one, this list of customers before
22 the October meeting? This is their very first
23 exhibit. We know what this is, ladies and gentlemen,
24 this is Gabe Serra saying to Frank Peake: You stole
25 these customers from me.

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1 And what does Frank Peake write back? He writes
2 back: Well, you stole these from me.

3 Now, did he use those words? No. But that's
4 what's going on there. Both sides are poking each
5 other in the chest. They're going after each other.
6 Frank is going after Gabe Serra's business there.

7 There are a lot of highlights on this e-mail right
8 before that October meeting. But one of the things
9 they have never discussed even 'til now, Mr. Lee
10 didn't talk about it, was predatory actions, predatory
11 items. Because, you bet, Frank Peake was not happy
12 about predatory actions. And the market had learned
13 its lesson about predatory pricing and Navieras.

14 Because when predatory pricing happens, the market
15 collapses. And Navieras went out of business because
16 of it. And Frank Peake wasn't going to allow for
17 predatory pricing. And that's not a crime.

18 What about Aqua Gulf? Because I agree that Aqua
19 Gulf was discussed at that 2006 meeting. But there's
20 nothing wrong with that, ladies and gentlemen. Aqua
21 Gulf, remember, was a competitor. And, remember,
22 after that meeting, Peter Baci sends public
23 information from the piers data. There's absolutely
24 nothing wrong with that.

25 And then Gabriel Serra corrects the public

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1 information. They're not talking about what to charge
2 Aqua Gulf, the prices and agreements, *how can we agree*
3 *to charge Aqua Gulf this*. No. No. No. No. No.
4 They're talking about the public market share data.
5 And Gabriel Serra, all he does in that response is fix
6 it, because it was incorrect, the data that was
7 public. And there's nothing wrong with that.

8 Speaking of Aqua Gulf, the prosecutor used this
9 e-mail quite a bit where Gabriel Serra talks about
10 you're playing into AGT and Transnow's hand. And you
11 remember what Mr. Peake says: He doesn't respond well
12 to threats. They haven't exceeded the allocation.
13 Don't send me stuff like this.

14 Now, this is very important, ladies and gentlemen,
15 because what was going on here -- and we heard it from
16 Mr. Serra, himself -- Aqua Gulf was a competitor, and
17 they were using Horizon's ships a lot of times. And
18 what was happening was Frank Peake was buying slots on
19 Horizon ships and selling those slots to Aqua Gulf at
20 a cheaper rate than Horizon.

21 So that's a lot of words; what does that mean?
22 That means Frank Peake was competing to sell Aqua Gulf
23 space, not on his ships but on Horizon's ships, and
24 that infuriated Gabe Serra. That infuriated him.

25 That's competition. That's not cheating. That's

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1 competing for Aqua Gulf's business. And Mr. Peake, he
2 used Horizon's own ships. Can you imagine how upset
3 the other side was? And that's why we saw that
4 e-mail.

5 We saw this e-mail from the prosecutor in his
6 closing. This is competition. This is Frank Peake
7 saying: I will fire back.

8 Clean windows, ladies and gentlemen, I'm asking
9 you to look at these e-mails and judge them for
10 yourself, not the spin that those people want to put
11 on them, because, as Ms. Moss explained, they have a
12 reason to exaggerate. They have a reason not to be
13 honest with you.

14 I mean, let's talk about maybe the worst e-mail
15 you saw in the whole case. What was the worst one?
16 It wasn't even an e-mail. Remember that fax that we
17 saw where it was "bcced" to Frank Peake; do you
18 remember that? And it wasn't actually e-mailed, it
19 was faxed. There was a line written, "To Greg," on
20 it. And they looked on everybody's computer, but they
21 didn't show you one example of that fax as an e-mail,
22 and that's because it wasn't sent as an e-mail.

23 And you remember Baci on the stand? He initially
24 said, well, I would "bcc" someone if I didn't want
25 that person to know if I was sending it. Remember

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1 that? And I had to correct him because he faxed it so
2 he would show, he would show, trying to intimidate
3 Glova, the kid. Trying to intimidate Glova.

4 If that e-mail was sent as an e-mail, you know you
5 would have seen it in those binders. You know you
6 would have seen it as an e-mail and not as a fax. But
7 you didn't. But you didn't.

8 What about all those calls, phone records? Well,
9 those are important. They didn't ask any of the
10 witnesses about those phone records until the very
11 end, Mr. Serra. And the phone records, ladies and
12 gentlemen, are the very definition of reasonable
13 doubt, the very definition.

14 Remember the e-mails? All these e-mails that
15 don't match up with the phone records? How many times
16 have we seen this one? Gabe says he hadn't received
17 it from Frank; remember this? I know I must have
18 shown it a million times.

19 How about this one where there was an e-mail where
20 it says, "Frank is raising this with Gabe as we
21 speak."

22 Now, if you see, this was sent on April 17th,
23 2007. When you go back into the jury room, make a
24 note to look at the phone records and see if there
25 were any calls in April of 2007, any calls. You won't

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1 see any. You won't see any.

2 So what does the prosecutor give you? Excuses.
3 Excuses. They say, well, if it's not in the phone
4 records, it must have been from the office phone.

5 What are we supposed to do to show that Frank
6 Peake is innocent? If the evidence shows a call, he
7 must be guilty. If the evidence doesn't show a call,
8 he must be guilty. Really? You can't have it both
9 ways. You can't have it both ways.

10 So let's talk about that October meeting then.
11 This is important, because when he went up to that
12 October meeting, the prosecutors time and again said
13 remember the TSA agreement was already signed back in
14 March, so there would be no reason to discuss the TSA.
15 And that was very misleading, wasn't it? Because I
16 had to come up and show you e-mail after e-mail after
17 e-mail after e-mail, month after month after month
18 after month that these guys were talking about TSA
19 after March of 2006.

20 Not just after March, but all the way up to
21 October 19th, 2006, Frank Peake -- this is
22 Exhibit 174, you'll have it back in the jury room,
23 take a look at it -- Frank Peake e-mails with Gabe
24 Serra on October 19th, and this is an e-mail about the
25 Horizon/Sea Star TSA, right before that October

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1 meeting.

2 And you heard the evidence from their own
3 witnesses. The pressure was building, every month,
4 the pressure about service, because Frank was a tough
5 customer and he was upset about how he was being
6 treated and about how Sea Star was being treated as a
7 customer. And he kept pounding Serra and pounding him
8 and pounding him.

9 And so it was very misleading for them to try to
10 tell you that no e-mails and no discussions happened
11 after March, because we had to show you, not only did
12 discussions happen, they happened over and over and
13 over and over again, all the way up to that October
14 meeting, about the TSA service issues. And Frank
15 asked for face-to-face meetings again and again.

16 Please, ladies and gentlemen, I can't go through
17 every e-mail, but you'll have those e-mails. Look at
18 them. Mr. Peake is saying: I want to meet with you
19 face to face and talk about this. This is a problem.

20 We had to show that to you. This is a court of
21 law. This is supposed to be about the truth here, as
22 Ms. Moss told you, and you were misled and it's very
23 disappointing.

24 What else was discussed at that 2007 meeting?

25 Well, we know about the predatory pricing from that

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1 e-mail. We know there was probably some poking going
2 on, right, with these guys? We know Aqua Gulf was
3 discussed as a competitor because there's market share
4 information going back. And there's nothing wrong
5 about that. And we know that all of the witnesses,
6 whenever they started talking about the conspiracy,
7 all told different stories.

8 And you know, Ms. Moss told a story, I'm going to
9 tell one too, because there's a great story in the
10 Bible about Rachel. And Rachel was out bathing one
11 day and two men came up to her and saw her, and they
12 said to her, "You will either sleep with us or we will
13 go to the town and tell the wise men that you did
14 sleep with us."

15 That was a big threat because back then
16 adultery -- Rachel was married -- adultery was a crime
17 punishable by death. But Rachel held firm and she
18 said, "I will not do that."

19 The two men went back into the town and told the
20 wise men, and the nine wise men brought Rachel before
21 them and said, "You have committed adultery and you
22 must hang for your crimes." And as they voted one
23 after the other, "Yes, hang, hang, hang," the last
24 wise man said, "Well, hold on a second. Let's bring
25 each of these men."

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1 So they brought in the first man and said, "Where
2 did you sleep with Rachel?"

3 And he said, "By the lake."

4 They brought the second man and said, "Where did
5 you sleep with Rachel?"

6 He said, "Under the maple tree by the lake." And
7 then each of them said.

8 We had the same exact thing happen on the stand.
9 When we asked specific questions, "Oh, the whole
10 meeting was about that 2007 document." Serra said,
11 "No, no, no, no, no, we didn't really talk about it,
12 that was for a future date." Everybody had a
13 different detail about what happened in that meeting,
14 because when you get down to it, ladies and gentlemen,
15 that's not what happened. They weren't being honest
16 with you.

17 Sure, they had gripes. You heard Gabe Serra talk
18 about the gripes that they had, but that's not
19 conspiracy, that's competition, fighting with each
20 other, poking each other.

21 And so if, when you look at that meeting, you
22 remember differences in stories, the Judge will
23 instruct you that you can reject that entirely. You'll
24 hear that instruction.

25 So let's talk about what Mr. Lee said this case is

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1 about. He said this case is about whether Frank Peake
2 is a competitor or a cheater. And I'd like to talk to
3 you right now about what the evidence showed about
4 that issue, because I agree with Mr. Lee.

5 And you all know that Frank Peake was competing.
6 I already showed you some e-mails about the slap
7 strategy. When business was taken away from Mr. Peake
8 and Sea Star, he slapped them back. You saw e-mails
9 about that. You saw documents. You saw Peter Baci's
10 journal about the slap strategy. That was Mr. Peake's
11 strategy about how to get business.

12 THE COURT: Thirty-two minutes have elapsed.

13 MR. MARKUS: Thank you, Judge.

14 You saw documents relating to Mr. Peake hiring a
15 management consultant, a leadership consultant, to try
16 to make the company better. If there was some
17 conspiracy, if he was cheating, he wouldn't be
18 bringing in people like this.

19 You heard evidence that he improved the ships, the
20 terminal, the equipment. He was spending money, the
21 company's money, to do these things. He was out in
22 front. If there was some agreement to split the
23 market 50/50, you don't need a better terminal, you
24 don't need better ships, you don't need better
25 equipment. But Frank Peake was competing. He was

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1 trying to make it better.

2 You heard Mr. Serra talk about him being a tough
3 customer. That's not something you can turn off and
4 on. That's who Mr. Peake is. And you saw it yourself
5 in those e-mails that we showed you.

6 But I think the most important evidence to show
7 that Frank Peake was competing was that third ship.
8 And I want to talk for a couple minutes about the
9 third ship because it just crushes their theory of the
10 case, it totally crushes it, because Mr. Peake had an
11 idea of putting a third ship in the water because he
12 wanted to get more market.

13 If there was cheating with Mr. Peake's
14 involvement, he wouldn't have been pushing for that
15 third ship. But because he was on the outside of that
16 agreement, he was pushing for it. And we see e-mails
17 talking about that.

18 And the Judge is going to instruct you the success
19 or the failure of those sorts of things isn't what's
20 important, it's not the success or failure.

21 So let's look at what those e-mails discuss about
22 the third ship and about whether Mr. Peake was about
23 *peace in the valley*, as we heard about Peter Baci, or
24 whether he was about fighting, about competing.

25 Do you remember this e-mail from Kevin Gill,

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1 clearly talking about him as an outsider? "I believe
2 Frank's ego and inexperience in this trade are getting
3 in front of smart leadership. He doesn't understand
4 the multi carrier Latin Emotion Jones Act trade where
5 the historical Puerto Rico law of physics says that
6 for every action, there is an overreaction that lasts
7 for three years."

8 They're talking about Mr. Peake going after their
9 little agreement; in other words, fighting and being
10 on the outside. He talks about Peake having an
11 aggressive posture, "negative to us and seeking deals
12 to take share."

13 But what about that third ship? Mr. Peake was
14 e-mailing the head of the company, Mr. McGee. And he
15 was talking about pushing -- "they," meaning Horizon,
16 are pushing back hard on our deployment of the third
17 vessel.

18 So what was Mr. Peake's plan? He says here is the
19 plan: Let's terminate the TSA we have with Horizon.
20 He wanted to terminate them because he's going to be
21 putting a third ship, he doesn't need to be for them
22 anymore. We will deploy three vessels.

23 He talks about how they won't sell Horizon any
24 space. Is this cheating or is this competing, ladies
25 and gentlemen?

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1 And he asks Peter Baci to run the numbers on what
2 the third ship would do, and this is Defense Exhibit
3 137. You still haven't heard the prosecutor discuss
4 it, and I'm going to ask that you look at this exhibit
5 back in the jury room, 137 of the defense, because
6 this is an internal Sea Star document where they start
7 exploring what a third ship would mean, and you see
8 what the projections are.

9 It says, right now, the split between Sea Star and
10 Horizon was Sea Start had 47 percent and Horizon had
11 53 percent.

12 By the way, pause for a moment. You've heard
13 about this 50/50 deal. Have you seen any evidence
14 throughout any of this trial that the market share was
15 split 50/50? It never was.

16 I'm sure you would have seen a fancy graph or a
17 chart showing 50/50 back and forth. But they never
18 showed you that because the market was never split
19 50/50.

20 What Frank Peake was trying to do was grab more
21 market. By '06, there would be 50/50. By '07, Sea
22 Star would have 53 percent, and by mid '07, 55
23 percent. And I ask you, ladies and gentlemen, does
24 that look like Frank Peake was competing or he had an
25 agreement on a 50/50 split? Please. This crushes

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1 their theory of the case.

2 And it wasn't just Sea Star that knew Frank Peake
3 was fighting for the business. Horizon ran the
4 numbers too. And this is Defense Exhibit 457. This
5 is Horizon getting nervous about what Frank Peake is
6 doing.

7 And you see here that Kevin Gill says that they're
8 going to lose up to 112 loads if Peake follows through
9 with his idea for a third ship. Ladies and gentlemen,
10 this is evidence. This is a dagger through their
11 heart.

12 Forget about proof beyond a reasonable doubt right
13 now. We have proven to you that Frank did not agree
14 to 50/50. Why would he be pushing for a third ship?

15 Now, did the third ship work out? No, it didn't
16 work out. It was only in the water a couple months.
17 But not because of Frank Peake, he was pushing for it,
18 he was fighting for that market share.

19 In fact, Horizon Lines, you'll see Mr. Serra, if
20 Mr. Peake was working with Mr. Serra on a 50/50 split,
21 why does Mr. Serra send Gill an e-mail saying, "We
22 need to understand what Frank's end game here," he's
23 talking about the ship, "and he may give you some
24 indication if you go about it the right way."

25 What Serra is saying to Gill here is: Go golf

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1 with Neil Perlmutter, that guy at Sea Star, and see if
2 you can find out what's going on.

3 Now, Frank was an insider. If Frank was part of
4 this 50/50, it would be very simple: Serra would call
5 up Peake and say, hey, what's going on here? What
6 about our 50/50?

7 That's exactly the opposite of what happened. It
8 got so heated between Mr. Serra and Mr. Peake that
9 Serra poked him in the chest. We all remember this
10 testimony, it was one of the few times we got to laugh
11 during this trial.

12 Does that sound like fighting and competing, or
13 does that sound like cheating? What about the "Who
14 Shot John" list? The "Who Shot John List" were lists
15 of customers that were taken away from Sea Star.

16 So, of course, the president wants to know which
17 customers they've lost. That's not a crime, for the
18 president to know which customers were taken.

19 If anything, that shows competition. I need to
20 know so I can slap them back. So I can slap them
21 back.

22 And we know that as hard as Frank fought, he
23 always wanted to do things equitable and legal.

24 They would have you believe that Mr. Peake was
25 evil in this one little area, but in everything else

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1 in life, he was legal and perfect and competitive. It
2 doesn't work like that. It doesn't work like that.

3 The market. We haven't heard much about the
4 market from the prosecutors. We had to bring out
5 about Navieras and what happened before 2002.
6 Remember, before 2002, Navieras was engaged in the
7 predatory pricing, charging so low, that the rates
8 went down so much that Navieras went out and the
9 industry was in shambles. And Bob McGee's, the head
10 guy, in 2003 made this bold speech after Navieras went
11 out, he said, listen, we all have to raise our rates.
12 The customers were there. The competitors were there.
13 Everybody in the industry was there. This wasn't a
14 conspiracy. This was *we have to fix this market, we*
15 *have to raise our rates.* So, of course, you're going
16 to see rates go up for two reasons:

17 One, one of the five companies is out. So now
18 we're down to four. Supply has gone way down. It's
19 as simple supply and demand. When one of five
20 companies goes out, you're going to see the prices go
21 up, and that was the culture of the market had
22 changed.

23 So, of course, prices can go up for legitimate
24 good reasons. We don't want predatory pricing. We
25 don't want another Navieras.

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1 And as prices go up, Mr. Peake understood that if
2 predatory pricing would take place, there would be
3 mutual assured destruction. Now, we saw that
4 expression used in an e-mail, "mutual assured
5 destruction." What does that mean?

6 That means if one side starts rate cutting and
7 predatory pricing, the other side is going to do it
8 too, and it's going to circle down.

9 Now, that's not a conspiracy, if you decide we're
10 not going to engage in predatory pricing and we're
11 going to call others out on it when they do. That's
12 not an agreement.

13 It reminds me of a baseball game. When a guy hits
14 a home run or another pitcher throws inside, sometimes
15 there has to be some retaliation, right? But the
16 pitchers know you can't throw at the baseball batter's
17 head. You've got to hit him on the shoulder or in the
18 hip, because if you throw it at the guy's head, you
19 know what's going to happen when you come up to bat?
20 They're going to throw at your head. And that's
21 mutual assured destruction. What happens there is
22 both sides start throwing at each other's head: bench
23 clearing brawl, and instead of playing baseball, we're
24 rolling around in the dirt fighting.

25 It was a different mindset in the industry: You

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1 can't engage in this predatory pricing.

2 Mr. Peake was a good boss and a good president.
3 And you heard about that. What about the profits and
4 losses of Sea Star? Is that evidence that Mr. Peake
5 was in a conspiracy, that the company started making
6 money after Navieras went out of business?

7 Actually, if you look at the chart that they
8 showed you of the profits and losses, starting at the
9 date of the conspiracy in 2005, the profit and losses
10 go down. Take a look at their exhibits when you go
11 back, on profit and loss, starting in 2005, Sea Star's
12 profit and loss goes down.

13 By the way, same with its compensation, it goes
14 down if you look at those numbers. You know, how dare
15 they say his salary and his bonus make him guilty of
16 this crime. There's no evidence of a crime. That is
17 not evidence of a crime.

18 And they can't have it both ways. Remember when I
19 asked Mr. Serra, "Did you have you a financial
20 interest?"

21 And he looked us all in the eye, and he said,
22 "No."

23 And I said, "What about all your stock options?"
24 Because Horizon is a public company.

25 He said, "Oh, yeah, I have millions of dollars in

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1 options."

2 That right there is a reasonable doubt, ladies and
3 gentlemen. He looked you in the eye and said that,
4 that he didn't have a financial interest.

5 So there's no crime in trying to get more market
6 as long as it's an internal decision. And this was
7 Frank's internal strategy. And you're going to hear
8 from the Judge that internal strategies, there's no
9 problem with.

10 And you see this memo (indicating)? This is a Sea
11 Star memo written in 2006. And I asked Mr. Baci
12 whether this was conspiracy related, and he said no.

13 What's Sea Star's strategic key issue? To try to
14 get 50 percent of the lift. Because right now they
15 had 48. There was no 50/50 split. They were going
16 for it internally. They wanted to obtain new
17 business.

18 Does that sound like competing or does it sound
19 like cheating?

20 There's other internal documents that I showed
21 you. I don't have a lot of time left, but you see
22 these documents where Sea Star was trying to achieve
23 50 percent? Not because of a conspiracy, but because
24 they were fighting for more market because they never
25 had 50 percent of the market. And Frank wanted more,

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1 and that's why he had that third ship strategy.

2 THE COURT: You have now 15 minutes left.

3 MR. MARKUS: Thank you, Judge. Time flies when
4 you're having fun.

5 So, you know, it reminds me a little of this logic
6 game that I learned back in elementary school. You
7 know, the logic flaw that the prosecutors have is:
8 There was a conspiracy to increase prices. Prices
9 did, in fact, increase. Therefore, Frank Peake must
10 have agreed to increase prices. That's what they've
11 argued to you.

12 How do we know that sort of logic is flawed? Let
13 me change the example. All jurors walk through the
14 metal detector in the morning, right? Greg Glova
15 walked through the metal detector on the morning he
16 testified; therefore, Greg Glova must be a juror. No,
17 the logic doesn't follow.

18 Just because there's increases in prices doesn't
19 mean that Frank Peake was part of a conspiracy.

20 What are conspiracies, ladies and gentlemen? They
21 are secret. By their very definition, secret phones,
22 secret e-mails, falsifying expense reports, initiation
23 meetings. We heard about all of those things. None
24 of them had to do with Frank. Gabe Serra instructed
25 on the secret phones. Gabe Serra was part of those

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1 initiation, in setting them up.

2 Frank Peake didn't do anything in secret, never
3 once, never falsified a report. Everything was out in
4 the open. He put on his expense report that he went
5 to Orlando in 2007. And he put in there that he
6 discussed the 2007 plan for TSA.

7 Now, he doesn't have a whole explanation in his
8 expense report, but we know from those e-mails what
9 was discussed going in to that October report, because
10 Frank Peake was out in the open.

11 Let me hit bunker fuel surcharge real quick before
12 I'm out. Now, Frank Peake never did one thing wrong
13 with bunker fuel surcharge. Craig Lee said he could
14 have done it the right way. He did do it the right
15 way! He had a formula. That's not a conspiracy,
16 excuse me, that's not a conspiracy. He had a formula
17 to determine how to charge bunker fuel. When it went
18 up, his formula showed how much he should charge, and
19 when it went down, how much to charge.

20 He was transparent. It was submitted to a
21 Government agency. The same pump was used, the same
22 vendor was used, the same ships, the same burn rate.

23 So what did they show you? They showed you an
24 e-mail where Gabe said, "Look at the news, prices have
25 gone up." And now it's a crime to send the news

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1 reports about prices of fuel going up? Don't blame
2 Frank Peake for the price of fuel going up. You've
3 got to blame the pump for that. I mean, I know they
4 want to blame him for a lot, but he's not to blame for
5 the price of fuel going up, I'm sorry.

6 And the fact that prices may have ended up the
7 same, of course all these things were the same.

8 The Judge is going to instruct you that you're
9 allowed to follow someone else. When someone else
10 publicly files a rate, you're allowed to follow, there
11 is no crime. Why do you think on the street corners,
12 we see gas stations charging the same amounts?
13 Because they post their numbers, and the gas station
14 across the street posts their numbers. That doesn't
15 mean that there's a conspiracy.

16 I'm not going to go through these e-mails with
17 you, I don't have time, but look at Defense Exhibits
18 182 and 183, where you see Serra saying Sea Star
19 hasn't followed us because our prices don't justify
20 it. That, again, crushes their theory on bunker fuel
21 surcharges, because Frank Peake stuck to the formula.
22 He stuck to the formula that he had. He didn't always
23 follow Horizon, because if the price didn't justify it
24 under his formula, he didn't do it.

25 Regarding the differentiation. We've heard that

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1 Frank Peake's company was a customer of Horizon.
2 Well, of course, they wanted to pay less on the
3 Jacksonville route, and Frank Peake suggested that:
4 Hey, we shouldn't have to pay the same on Jacksonville
5 as for Houston and New Jersey. He was negotiating for
6 a better rate, and they call it a crime.

7 What about the plea agreements? I mean, really,
8 their case comes down to three witnesses. In a lot of
9 ways, I'm reminded of the word that Judge Dominguez
10 used at the beginning of the case, *bizcochito*.
11 Because if you look at this case but without those
12 three witnesses, this case is a piece of cake. We
13 can't convict a man based on that. I'm sorry.

14 These people have a reason to lie. They have a
15 reason to exaggerate. It reminds me of that sign at
16 the circus that says "Come see the dancing bear." The
17 dancing bear? And you go and you see the chains; yank
18 the chain and the bear dances. They have that plea
19 agreement hanging over their head like chains. And if
20 they don't get up there and dance, that's when the
21 agreement is pulled, and that's the last thing they
22 want.

23 So thank goodness we have the objective evidence.
24 We showed you those journals by Baci. They introduced
25 one page of 30 notebooks. Not one page of those

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1 notebooks showed that Frank Peake was involved.

2 We had to show you that Greg Glova kept detailed
3 calendars. We had to show you that Peter Baci, after
4 he pled guilty, wrote a memo, he and his lawyer, to
5 the Judge, talking about who was involved in the
6 conspiracy and not mentioning Frank Peake; talking
7 about Lenny Shapiro, Gill, Glova, Serra, and no Peake
8 in this whole sentencing memorandum.

9 And Peter Baci kept those detailed journals so
10 that when a day like this came, he had a get-out-of-
11 jail-free card. He could show, look, all these people
12 were involved, but there is nothing about Frank being
13 involved in that conspiracy. And you saw, he detailed
14 Lenny Shapiro meetings, Gabe Serra, Greg Glova, Gill
15 e-mails, Orlando. Nothing about Frank Peake.

16 That's evidence, ladies and gentlemen, that's
17 objective evidence from the time that this happened.
18 Not dancing bears from the stand.

19 And Baci called Mr. Peake from the jail, you
20 heard, again and again, and he told Frank that this is
21 a vindictive process and to plead guilty. And Frank
22 said no. Frank is here because he's innocent. He
23 said no because, ladies and gentlemen, we learned from
24 Proverbs that the guilty flee when no man pursueth and
25 the righteous stand bold as a young lion. And we are

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1 here today fighting because we are innocent and did
2 not run and we did not plead even though this process
3 is vindictive. But we believe in it. We believe in
4 you all and we believe in this jury system, because we
5 saw from the journals who Frank Peake was.

6 We saw from the journals that Frank Peake was
7 about the people and that he wanted to put this third
8 ship in the water, even though it cost money, but we
9 needed it for long-term growth in Puerto Rico.

10 Don't believe me. Believe what Peter Baci wrote
11 at the time. If there was a 50/50 split, you wouldn't
12 see Frank Peake saying we need long-term growth with
13 our third ship.

14 THE COURT: You've got about five minutes.

15 MR. MARKUS: All right.

16 Other than those three witnesses, who did we have
17 on the stand? Two witnesses that didn't know Frank,
18 Gabriel Lafitte, who showed Gabe Serra to be a liar.
19 Remember, he said, "Gabe Serra came to me and said
20 there was a gentleman's agreement." And then I asked
21 Gabe Serra, he said, "I don't remember saying that."

22 It actually shows in a lot of ways how different
23 meetings can be misinterpreted. The U.S.D.A. guy,
24 Ron Reynolds, why did they call him to talk about
25 school lunches? Does that have anything to do with

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1 this case?

2 They want you guys to be angry about Puerto Rico.
3 But the Judge is going to instruct you that that's not
4 what this case is about. Okay?

5 You all are smarter than that. All right. When
6 you don't have the evidence on your side, you talk
7 about school lunches being more expensive in Puerto
8 Rico. And that's not what this case is about.

9 They underestimate you guys, ladies and gentlemen.
10 They want it both ways. They want that if there's a
11 phone call, he must be guilty; if there's no phone
12 call, he must be guilty. If there are secret e-mails,
13 he must be guilty; if there are no secret e-mails, he
14 must be guilty. If there was an initiation meeting,
15 guilty. No initiation meeting, guilty. If you're in
16 Baci's journals, you're guilty, and if you're not,
17 you're guilty. If there's a document found in your
18 office, you're guilty. If there's no document found
19 in your office, you're guilty.

20 How do you show you're not involved? I mean, they
21 want it both ways. They say there's evidence against
22 these guys, but when there's not evidence, guilty too.

23 Come on. Reasonable doubt is much more than that.
24 Proof beyond a reasonable doubt.

25 I wrote a list of 15 questions, I'm not going to

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1 get a chance to go through those 15 questions because
2 I've run out of time, with all kinds of reasonable
3 doubt in the case, but you all know what I'm going to
4 say at this point.

5 I've been up here with the witnesses. I've been
6 up here now for a long time and you know what I'm
7 going to say.

8 And I'm going to sit down now and I'm going to
9 say, my goodness, you know, I forgot to make all these
10 arguments, and I'm going to pull what little hair I
11 have left out and I'm going to apologize to you,
12 frankly, for not saying everything that I wanted to
13 say. But you all know my position. You do. And I'm
14 asking you to go back in that jury room -- you listen
15 to Mr. Snyder because he's going to get up here now.
16 I'm not going to have a chance -- I'm going to want to
17 jump out of my seat when he's talking, but I'm not
18 going to be able to. But you know what I'm going to
19 say in response to his arguments. You know it.

20 When you're back in that jury room, you know what
21 I would say about the things that they're raising.

22 I'm here, ladies and gentlemen, to tell you that
23 Frank Peake is innocent. I'm asking you to find him
24 innocent. I'm asking you to do the right thing and
25 send him home and end this nightmare. Please. Frank

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1 Peake is innocent.

2 Thank you all very much.

3 THE COURT: Thank you.

4 United States, 50 minutes. This next section is
5 going to go 50 minutes; it could go 50 minutes, it
6 could go less. So if anybody wishes not to take a
7 break, we're going to wait here in place. Go ahead.

8 (Pause.)

9 Counsel Snyder, sir, it is now 2:35 in my watch.
10 You have 50 minutes.

11 MR. SNYDER: All right. Good afternoon, ladies
12 and gentlemen. At the beginning of trial last week, I
13 stood up here and told you what I thought the evidence
14 would show in this case. I told you that you'd hear
15 from Greg Glova, Peter Baci, and Gabe Serra about the
16 conspiracy and Frank Peake's participation in it, and
17 you did.

18 I told you you would see documents related to the
19 Office Max contract and how it was fixed by Sea Star
20 and Horizon, and you did. I told you you would hear
21 from victim witnesses, like Burger King and U.S.D.A.,
22 and you did.

23 And I told you that you would see e-mails to and
24 from Frank Peake, documents written by him in his own
25 words. And you did. Documents that showed his

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1 participation in the conspiracy.

2 And Ms. Moss and Mr. Markus just stood up here and
3 did what they're supposed to do: They defended their
4 client. They made lots of arguments to defend their
5 client. But the one thing they didn't do is point to
6 any of the evidence that I stood up here a week-and-a
7 half ago, or almost two weeks ago now, and told you
8 that you would see, and say that we didn't show it.
9 You saw every piece of it. You heard from every
10 witness you were told you would hear from.

11 Instead, they attempted to divert you. They
12 talked about third ships and TSAs and said *look over*
13 *here*. They talked about things like Frank Peake being
14 a tough customer and a fighter. *Look over here*. They
15 talked about names missing from documents and wanted
16 you to *look over here*. And they talked and said
17 things about flat tires, signs in courtrooms, clean
18 windows, dirty windows, and wanted you to *look over*
19 *here*. What they don't want you to look at is all of
20 the evidence that's been presented to you in this case
21 about --

22 THE COURT: Before you're misled, it's 40 minutes,
23 not 50.

24 MR. SNYDER: Thank you, Your Honor.

25 THE COURT: All right.

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1 MR. SNYDER: They tried to explain away a couple
2 of e-mails that you were shown during this trial, and
3 you were shown many, many e-mails by the Government.
4 But they can't explain them all away. They didn't
5 really try to explain them all away.

6 MR. MARKUS: Objection, Your Honor.

7 MR. SNYDER: There's a reason for that. Because
8 they can't. Whether you look at them through clean
9 windows or dirty windows, you have to not believe your
10 own eyes to believe that those were legitimate
11 e-mails.

12 Now, Mr. Markus talked a lot during trial and a
13 lot today about the TSA. He said that Mr. Serra and
14 Mr. Peake had legitimate TSA meetings; that Mr. Peake
15 wasn't doing anything wrong when he had those
16 meetings, that there was nothing illegal about TSA
17 meetings.

18 But that explanation won't float. You heard over
19 and over again from Greg Glova, Peter Baci and Gabriel
20 Serra, that the TSA agreements between the two
21 companies set prices that Horizon charged Sea Star as
22 a customer. The TSA was not about prices that Sea
23 Star and Horizon would charge their own customers.
24 Everyone knew they weren't allowed to talk about
25 customer deals, customer contracts, market share

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1 splits, bunker fuel surcharge, as part of their TSA
2 discussions. Peter Baci told you that.

3 And Jaime, could you go ahead and pull up that
4 first quote.

5 Mr. Baci was asked, "Was it your understanding
6 that you were allowed under the Transportation
7 Services Agreement to discuss the rates that they were
8 charged to their commerce?"

9 It says commerce, I believe that may have been
10 customers.

11 "ANSWER: No, sir."

12 "QUESTION. Why not?"

13 "ANSWER: Because it was a violation of the
14 antitrust law."

15 So you heard over and over that everyone knew they
16 weren't supposed to talk about these subjects; that
17 these were taboo, they were off limits, they were
18 illegal. Market share splits, bunker fuel surcharge
19 increases, everyone knew you were not allowed to touch
20 those things in a TSA meeting or in any other context.

21 Yet you saw document after document where not only
22 Peter Baci, Greg Glova and Gabriel Serra were involved
23 in those communications, but Frank Peake was as well,
24 about specific customer negotiations.

25 They did talk about the 50/50 market share split

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1 and they did talk about bunker fuel surcharge changes.
2 Everyone of the witnesses testified about that, Greg
3 Glova, Peter Baci and Gabe Serra. Each one of them
4 told you that those discussions had nothing to do with
5 the TSAs, and what they told you was backed up by
6 documents, that those forbidden discussions were
7 taking place and that Mr. Peake was part of them.

8 No one denies that Frank Peake and Gabe Serra had
9 discussions about TSAs. No one is claiming that those
10 discussions were illegal or inappropriate. No one is
11 claiming that the TSA is the reason that we're here.

12 The reason we're here is because of those other
13 communications. Those communications about price.
14 Those communications about customer contracts. Those
15 communications about the Florida 50/50. Those
16 communications that tie Frank Peake and his
17 co-conspirators together regarding these illegal
18 subjects. Communications that furthered the
19 conspiracy to raise prices of Puerto Rico freight
20 shipments. That's why we're here.

21 Frank Peake isn't being prosecuted for negotiating
22 TSAs with Horizon. We didn't show you lots of TSA
23 documents because that's not reason we're here. We're
24 here for all of the other things that he talked to
25 Horizon about.

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1 Frank Peake is being prosecuted not because he was
2 a tough negotiator of legal TSA agreements. Frank
3 Peake is being prosecuted for being a negotiator of
4 illegal price-fixing agreements and being a problem
5 fixer for the conspiracy. Which brings me to another
6 thing that we're not here to talk about and that Mr.
7 Peake isn't being prosecuted for, and that's the third
8 ship that was deployed in the Puerto Rico trade lane.

9 Mr. Markus said, "What about the third ship?"
10 Well, let's talk about the third ship. I've been
11 waiting to talk to you about the third ship. They
12 want you to look, way, way, way, over here --

13 MS. MOSS: Objection, Your Honor. That's improper
14 argument.

15 MR. SNYDER: -- at the third ship.

16 THE COURT: No, no, that is argument. We will
17 keep on going. The jury will evaluate it and will
18 make a determination.

19 MR. SNYDER: The third ship is just like the TSA,
20 it's something legal in and of itself that had nothing
21 to do with the illegal agreements between both
22 companies.

23 Now, the defense argues that by adding a third
24 ship Frank Peake was showing that he was a competitor,
25 that Sea Star was competing. But the third ship

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1 doesn't prove that. The third ship wasn't about Sea
2 Star as a competitor, it was about Sea Star as a
3 customer, a customer of Horizon. Frank Peake didn't
4 want to have to buy space on Horizon ships anymore, he
5 didn't want to be a customer of Horizon anymore. So
6 he decided he wanted to add a third ship. Adding that
7 third ship shows nothing about Sea Star as a
8 competitor though.

9 In fact, what happened shows that Sea Star was not
10 competing because nothing changed. Nothing between
11 the companies changed.

12 Peter Baci was asked about the third ship during
13 his cross-examination by Mr. Markus. When Mr. Markus
14 was trying to suggest that Frank Peake's involvement
15 in deploying the third ship was disrupting the
16 conspiracy or disrupting peace in the valley.

17 And he was asked,

18 "QUESTION: The strategy that Frank Peake had to
19 put a third ship into the market was not a "peace in
20 the valley" strategy, was it, sir?

21 "ANSWER: I do not believe that deploying the
22 third ship would have any effect on the peace in the
23 valley or the 50/50 rule."

24 The third ship had nothing to do with the 50/50
25 rule. They didn't rescind the 50/50 rule for those

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1 two months that the third ship was in, was in effect.
2 And why is that? Because the 50/50 rule, the market
3 share split, the Florida 50/50, always remained in
4 effect. It was in effect before, it was in effect
5 during, it was in effect after.

6 Ignoring this, ignoring that it had no effect at
7 all, Mr. Markus showed you Defense Exhibit No. 137.
8 He showed you something that never happened and told
9 you to *look over there*.

10 Well, let's go ahead and pull up Exhibit 137.
11 Exhibit 137 -- and this is Defense Exhibit 137 -- says
12 that maybe, maybe, with a third ship Sea Star could
13 increase its market share to 55 percent or higher.
14 But you heard witnesses say that it never happened.
15 Whether Horizon had a third ship or Sea Star had a
16 third ship, nothing ever changed. The market share
17 was always right around 50/50. Just like Leonard
18 Shapiro and Gabe Serra first agreed, and just like
19 Frank Peake and Gabe Serra reconfirmed and agreed at
20 the Orlando meeting. Just like Peter Baci and Greg
21 Glova worked day after day, week after week, month
22 after month, and year after year to achieve.

23 You saw the e-mails that go back and forth between
24 them comparing market share. You remember Greg Glova
25 sending an e-mail saying: You guys have the higher

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1 lift out of Jacksonville than we do. Make sure you
2 let Frank know that.

3 That was the 50/50 rule and it was in effect, it
4 was always in effect. How do we know it always
5 remained in effect? Because Frank Peake's
6 co-conspirators all told you that it remained in
7 effect. Greg Glova told you that it remained in
8 effect, Peter Baci told you that, Gabe Serra told you
9 that. And they all told you that it remained in
10 effect so that both companies weren't fighting for
11 market share, that things were stable and they could
12 increase rates. You don't have to rely on what Peter
13 Baci or any of them said on the stand here in court,
14 because you can actually look at the documents written
15 at the time and you'll see exactly what happened.

16 So let's go ahead and look at Government's
17 Exhibit 176. Government Exhibit 176 was one of the
18 secret gmails. It was sent in November of 2007, after
19 Sea Star should have been at 55 percent based on
20 Exhibit 137. If Sea Star were competing, its market
21 share should have been skyrocketing according to
22 Exhibit 137. But what actually happened? Peter Baci
23 is writing that Sea Star is looking at these stats, as
24 you'll see below, in an e-mail to Greg Glova, looking
25 at these stats we were at 46 percent versus 50 percent

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1 the year before. This, after taking into account the
2 autos, et cetera, as agreed in Orlando.

3 That is the October 2006 Orlando meeting where
4 everybody, including Greg Glova, mentioned discussions
5 about the 50/50 agreement.

6 It therefore looks like we are in need of 70 loads
7 per week to be at 50/50 again.

8 He's saying "to be at 50/50 again," which implies
9 that they have in the past been at 50/50. The 50/50
10 rule was always in effect. Far from obliterating the
11 Government's 50/50 case, the third ship is nothing
12 about the 50/50 rule. The 50/50 rule was the rule of
13 the conspiracy and it was always in effect.

14 Frank Peake may have been a tough customer when it
15 came to the third ship and TSAs. But Frank Peake, the
16 tough competitor? Are you a tough competitor when you
17 reach agreements to divide market share equally with
18 your competitors?

19 Are you a tough customer when you talk with your
20 competitor about customer negotiations so that you are
21 essentially rigging your bids to your customers?

22 Are you a tough customer when you're reaching
23 agreements with your competitors about the bunker fuel
24 surcharge? That's not a tough competitor. That's a
25 price-fixer. And that's what Frank Peake is.

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1 Mr. Markus also told you some things about the
2 Transconex document, the visitor from the pacific
3 northwest document. And he talked about the need to
4 look at the documents so you don't accept the spin
5 that gets put on the documents. But in doing that,
6 Mr. Markus did exactly what he was telling you to
7 caution against, he put his spin on the documents, not
8 a spin that any of the witnesses ever accepted, any of
9 the witnesses who received that. He put his spin on
10 the documents. Gabe Serra never said that B.S. meant
11 that he was snowing Frank or he was trash talking to
12 Frank.

13 He said, "When I sent that document, I meant what
14 I said, that I was holding the line, and I was upset
15 with Frank Peake that he would doubt me."

16 So, what he told you you shouldn't do is exactly
17 what he was standing up here and doing. Consider what
18 the witnesses told you about the documents. They're
19 the ones that know. They're the ones that know what
20 they meant when they sent them. And they know, when
21 they took the stand here, what those documents mean.

22 I want to talk about one more instance of spinning
23 the document. Can we see Exhibit 32?

24 Jaime, you know that I am blind, can you pull up
25 the doc in the Frank Peak e-mail, on the first page,

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1 the line about "never send me an e-mail like this
2 again."

3 This, as I recall from memory -- I'm seeing a very
4 blurry version up there -- is an e-mail from Frank
5 Peake to Gabe Serra, dated, I believe, March 7th,
6 2008. And he says, "Don't ever send me an e-mail like
7 this again."

8 And Mr. Markus said he sent that because -- he was
9 offended to ever get an inappropriate e-mail like this
10 and he never wanted to see one again because of the
11 sensitive, competitive topics that Mr. Serra was
12 broaching in his e-mail.

13 MR. MARKUS: Objection. That's not what I said,
14 Your Honor.

15 THE COURT: There is obviously a conflict between
16 what you said, what he said.

17 They will decide the conflict.

18 Go ahead. Keep on going.

19 MR. SNYDER: Let's look at Exhibit Number 34 now.
20 An e-mail that was sent just a couple of weeks later.
21 And let's look at the very first e-mail on the bottom
22 of the screen, Jaime. Is it on the first page? There
23 you go. This is actually an e-mail from Frank Peake
24 to Gabe Serra, just about a week later or two weeks
25 later, March 22nd or 23rd, 2008.

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1 What's he doing? He's e-mailing Gabe Serra to
2 complain about what Sea Star viewed as actions by
3 Horizon that affected their customer relationships.
4 The very same types of things that Gabe Serra was
5 complaining about in the earlier e-mail.

6 If Mr. Peake really meant when he said, "Don't
7 send me an e-mail like this again," if he really meant
8 this is inappropriate, I don't want to see this, I
9 don't want to receive this type of thing, why did he
10 turn around just a few days later and send virtually
11 an identical e-mail?

12 And then, as you see, as you play out the string,
13 as Mr. Lee told you this morning, the next e-mail is
14 Gabe Serra saying, "The communication sure isn't
15 working well, like it used to."

16 Frank Peake responds, "You're right. We have the
17 same concerns. Pete has similar complaints."

18 They're acknowledging the conspiracy here. He's
19 not saying it's inappropriate. He's saying we've got
20 problems, we need to work together to fix it.

21 That's what you heard from the witnesses, the
22 witness who was involved in this string, Gabe Serra.

23 The defense also wants to point to all the places
24 where Frank Peake's name doesn't appear. Let's take a
25 look at that argument for a few minutes. Now, you

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1 heard a lot during the trial about a one-and-a-quarter
2 page written statement that Greg Glova signed after
3 the F.B.I. wrote it out for him. It was a three-hour
4 interview that was summarized into a very hastily
5 scrawled document that would take three minutes to
6 read. Frank Peake's name does not appear in that one-
7 and-a-quarter page document. Peter Baci's name
8 appears in it only once despite the fact that Peter
9 Baci's name was undoubtedly mentioned a number of
10 times during that interview.

11 As you may recall from Mr. Glova's direct
12 examination, there were multiple references in the
13 statement to communications with Sea Star or with
14 competitors. And Mr. Glova told you that people at
15 Sea Star that he was talking about or that would have
16 been covered by those statements included Frank Peake
17 and Peter Baci. And he talked about an example of
18 this with respect to the bunker fuel surcharge, in his
19 F.B.I. statement, a statement about the bunker fuel
20 surcharge. And he was asked this question,

21 "QUESTION: And I believe it also says that, it
22 being the F.B.I. statement, quote, I also used other
23 techniques to further influence the award of contracts
24 to my company and my competitor's companies. We
25 discussed these on bunker. Do you see that?"

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1 "ANSWER: Yes, sir."

2 "QUESTION: Would that statement apply to any
3 individuals at Sea Star?"

4 "ANSWER: Yes, sir."

5 "QUESTION: Who?"

6 "ANSWER: Frank Peake and Peter Baci."

7 And as you saw, Exhibit 49 proves that Frank Peake
8 was involved in bunker surcharge communications with
9 Horizon and that Greg Glova knew about it. So it's
10 not surprising that Greg Glova said that Frank Peake
11 would have been included in that statement. And it's
12 also not surprising that Frank Peake wasn't
13 specifically named in that particular statement
14 because nobody else was in that one either. He just
15 referred to his competitors.

16 Why would Greg Glova write Frank Peake's name when
17 he didn't write anybody else's name down?

18 More importantly, Mr. Glova said he mentioned
19 Frank Peake by name to the F.B.I. that day. You also
20 heard the tape recorded conversations between Greg
21 Glova and Gabe Serra that both mentioned Frank Peake
22 in those calls, and the F.B.I. was there to hear it
23 and you heard it too.

24 THE COURT: Twenty minutes have elapsed, which is
25 half your time.

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1 MR. SNYDER: And in those calls you heard about
2 how the conspiracy worked, how Frank Peake was part of
3 it, so that Frank Peake and Gabe Serra could fix
4 problems. And you heard Gabe Serra say that he had
5 already talked to Frankie, to Frank Peake; not that he
6 was going to, that he already had. This wasn't a
7 setup by the F.B.I. Gabe Serra said he had already
8 talked to Frank Peake, even before the F.B.I. had
9 gotten involved, even before Gabe Serra knew that the
10 F.B.I. was waiting for him at his office. That's the
11 way the conspiracy worked, and you heard it on tape.

12 Why would Gabe Serra make that up? Like I said,
13 he didn't know the F.B.I. was waiting at his office
14 for him. He was still in conspiracy mode. And that
15 conspiracy mode is exactly what you heard about from
16 Greg Glova, Peter Baci and Gabe Serra at trial. They
17 all said that Gabe Serra's and Frank Peake's major
18 role in the conspiracy was to take care of problems
19 like this, and you heard it happen.

20 The defense also questioned Mr. Baci about a court
21 filing by his lawyer in connection with his
22 sentencing. It didn't mention Frank Peake by name.
23 But he also recalled that the document talked about
24 how the conspiracy started, about how Gabe Serra and
25 Leonard Shapiro reached the Florida 50/50 agreement,

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1 and how Peter Baci and Kevin Gill then implemented it.
2 That's true. Frank Peake wasn't involved in the
3 conspiracy at that time and he's not been charged with
4 that.

5 You also heard arguments about the notebooks and
6 whether Frank Peake's name was in them, whether it was
7 Greg Glova's calendar entries or Peter Baci's
8 notebooks. First, neither of the witnesses could
9 remember for sure when they were on the stand whether
10 Frank Peake's name was in them or not. But more
11 importantly, let's look at all the places that Frank
12 Peake's name was seen during the course of trial.

13 Now, you've seen some of them, but his name was in
14 lots of other documents, lots of other e-mails, all
15 those e-mails that can't be explained away by TSAs or
16 third ships or chest poking; all the conspiracy
17 documents that Frank Peake's name is all over, that he
18 sent, that he received, that talked about what he was
19 doing, as he was doing it, the written record of the
20 conspiracy as it was happening:

21 So let's see where Frank Peake is. He wasn't in
22 these two documents that were written after the
23 conspiracy was over, after the F.B.I. landed on Greg
24 Glova's doorstep and after Peter Baci had retained a
25 lawyer.

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1 So where is he? Frank Peake is everywhere else.
2 He's in e-mails about beer customers. Like
3 Exhibit 29, where Peter Baci e-mails a rate proposal
4 to Kevin Gill and "bcc's" Frank Peake. That's not an
5 innocent information exchange. It's price-fixing for
6 Kevin Gill and Peter Baci to coordinate the rate
7 proposals, and Frank Peake, he's on it. Or
8 Exhibit 27, where Frank Peake e-mails Gabe Serra and
9 says, "Hope you didn't do anything. We are told that
10 we are now hired."

11 Gabe Serra confirms, "Nothing at all."

12 Confirmation that the pricing agreement was being
13 carried out to the customer.

14 Where is Frank Peake's name? Well, Mr. Markus
15 showed you Exhibit 37, one of the Transconex e-mails,
16 telling Gabe Serra that he didn't want any mistakes on
17 pricing and that he didn't doubt Gabe Serra would hold
18 the line.

19 He was asking Horizon to stay out of Sea Star's
20 way for this customer. What does that tell you? What
21 does no mistakes mean?

22 That means that Frank Peake believed that Horizon
23 had agreed to stay out of his way and he was sending a
24 reminder. That's enough to convict, whether or not
25 Sea Star won that business or Horizon won that

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1 business. The agreement is the crime, as you're going
2 to hear from Judge Dominguez.

3 Where's Frank Peake's name? Frank Peake's name is
4 in the Walgreens' documents, Exhibits 57 and 70.

5 The first one, you see that Peter Baci is telling
6 Greg Glova that Frank and Gabe were talking about a
7 deal where Horizon would pay for container slots that
8 it didn't use in order to make up for the loss of
9 revenue to Sea Star from the loss of the Walgreens
10 business until the 50/50 could be rebalanced.

11 And then you see Frank Peake on the e-mail, the
12 internal e-mail at Sea Star, actually telling the CFO
13 of the company to bill those container slots to
14 Horizon. There's no other explanation than this
15 relates to the 50/50.

16 Where's Frank Peake's name? Frank Peake's name is
17 in the Quirch documents, like Exhibit 127, where Peter
18 Baci and Greg Glova e-mail each other that they had to
19 bring their bosses into the numbers because if there
20 had been a mistake in the bids to Quirch. Just the
21 way the conspiracy worked, if there was a mistake, if
22 there was something that was big that these two
23 couldn't work out themselves, they brought their
24 bosses into it. And that's exactly what Exhibit 127
25 says.

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1 Where is Frank Peake's name? Frank Peake's name
2 is in the DSM e-mail, Exhibit 121. Exhibit 121
3 says -- DSM is department store merchandise. And in
4 this e-mail he, Frank Peake, and Gabe Serra, are
5 agreeing on what rate structure to use for this type
6 of cargo. That's price-fixing, and Frank Peake's name
7 is on it.

8 Where is Frank Peake's name? His name is in the
9 faxed e-mail regarding the 50/50 agreement, Exhibit
10 73. That document actually uses the words NB 50/50 or
11 Northbound 50/50. Mr. Peake can't deny what this
12 e-mail says, so he has to deny that the e-mail was
13 sent.

14 So ask yourselves this: Does it make sense that
15 Peter Baci would go to the effort of opening up his
16 e-mail, typing out an e-mail, typing a "bcc" line
17 saying that Frank Peake was "bcced," only then hit the
18 print button, and the print button only, rather than
19 the send button. Ask yourselves if that makes any
20 sense. Did Peter Baci seem so computer illiterate to
21 you that he would go to all that trouble to do that
22 and then not hit the send button? You can decide that
23 for yourselves because there's lots of other documents
24 that have Frank Peake's name on it, you don't need to
25 rely just on that one.

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1 Where else is Frank Peake's name? On the many
2 documents showing that he met with Gabe Serra to talk
3 about market share, like the Condado meeting documents
4 that Mr. Lee showed you this morning, the "Who Shot
5 John List," the bunker fuel surcharge documents, and
6 other conspiracy topics.

7 They knew they shouldn't be having these
8 communications. They knew these were illegal
9 agreements and illegal topics. This was not an
10 innocent information exchange like the defense
11 suggests. It's not legitimate to have communications
12 like this with your competitors. This is not business
13 as usual; it's not business as usual to fix prices,
14 it's not business as usual to break the law. And
15 Frank Peake was involved in all of it. You heard that
16 through Peter Baci, Greg Glova and Gabe Serra, and you
17 saw it in the documents, the conspiracy documents, the
18 ones that were written while it was happening.

19 Just look at Exhibit 267, Gabe Serra and Frank
20 Peake trying to avoid being seen together by people
21 that Gabe Serra worked with. Why? Because they knew
22 how it was going to appear. They knew it would look
23 bad.

24 And not only did they know it would look bad, they
25 knew it was bad, because they knew what they were

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1 doing. Where was Frank Peake? He was secretly
2 peaking up Gabe Serra so they could conspire.

3 Think about that as you deliberate. Think about
4 this as you deliberate: What's more reliable, a
5 confession written by someone else summarizing a
6 three-hour interview in a single page-and-a-quarter,
7 or document, after document, after document, that was
8 sent to or from Frank Peake but that describes his
9 conduct at the time during the conspiracy, as it was
10 happening? You can decide that for yourselves. You
11 can decide for yourselves where it's more important to
12 find Frank Peake's name.

13 There was a lot of talk about the Orlando meeting,
14 and I just want to touch very briefly on it.

15 There was not a shred of testimony that there was
16 any discussion at that Orlando meeting about any TSA
17 related topic. Every single person said it was the
18 rate plan, and they didn't even really stand up here
19 and try to take the rate plan on. That rate plan is
20 what it is, it's as blatant as the witnesses said.
21 And that, everybody agreed, was discussed at Orlando.

22 They said, well, Greg Glova, he didn't say the
23 50/50 was discussed. But Peter Baci did and Gabe
24 Serra did. But, actually, Greg Glova did say the
25 50/50 was discussed. He was shown Exhibit 19, a fax

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1 that was sent to him at the Orlando Hyatt by Sam
2 Raymond. And he said that that fax was sent to him
3 for purposes of having a discussion about the 50/50.
4 So, in fact, all three of them did say that the 50/50
5 rule was discussed at that meeting.

6 You also saw Peter Baci's subsequent e-mail a few
7 minutes ago, where he reminded Greg Glova about the
8 agreement at Orlando about the 50/50 rule. The same
9 Orlando meeting that Mr. Peake was at.

10 So Orlando is what Orlando is. There were lots of
11 bad things discussed there, according to the
12 witnesses. You've seen the documents. And you
13 haven't heard anything to suggest that there was
14 anything legitimate discussed there.

15 Look at as many TSA documents as you want, but
16 there is not a shred of evidence that anything about
17 the TSA was discussed at the Orlando meeting.

18 THE COURT: Nine minutes left.

19 MR. SNYDER: They also make the surprising
20 argument that the Government didn't call enough
21 co-conspirators in this case; that there were more
22 conspirators that they wanted to hear from. Really?

23 The Government called three co-conspirators of
24 Frank Peake, three co-conspirators who all admitted
25 the conspiracy; three co-conspirators who all pled

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1 guilty to the conspiracy; three co-conspirators who
2 all accepted responsibility for the conspiracy; three
3 co-conspirators who all met with Frank Peake, who all
4 testified that they conspired with Frank Peake. Three
5 co-conspirators who were corroborated by document
6 after document after document.

7 How much more do they really want to see? And why
8 do you need to hear from an F.B.I. agent? No F.B.I.
9 agents were conspirators here. You want to hear from
10 the person who wrote the confession, or do you want to
11 hear from the person who actually confessed, pled
12 guilty, and accepted responsibility for it and
13 appeared here to testify about what he did in the
14 conspiracy? You can decide that for yourselves.

15 The testimony by just one co-conspirator is enough
16 to support a verdict against Frank Peake. Testimony
17 by a second co-conspirator corroborates the testimony
18 of the first. And testimony by the third
19 co-conspirator is just more of the same. The
20 Government doesn't have any obligation to call every
21 single co-conspirator or to introduce 29 notebooks of
22 handwritten notes, nor do I suspect that you would
23 want us to.

24 And Judge Dominguez is going to give you an
25 instruction, an instruction on this very same issue,

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1 that says that, "The Indictment charges the defendant
2 conspired with certain persons and companies that are
3 not now on trial. There's no requirement that all
4 members of a conspiracy be charged and prosecuted or
5 tried together in one proceeding, and you should not
6 be concerned with or speculate about why certain
7 persons or companies are not on trial or why any
8 persons or companies have not been charged in the
9 Indictment."

10 Now, you heard evidence of deep involvement by
11 other people, like Leonard Shapiro, like Kevin Gill of
12 Horizon, Tom Farmer of Crowley. But you don't need to
13 worry about them, why you didn't hear from them or
14 where they are now. You only need to worry about
15 Frank Peake, the president of Sea Star, the man who
16 could have stopped the conspiracy, the man who fixed
17 the conspiracy's problems and the man who fixed prices
18 to his customers. That's why he's on trial here
19 today, because he chose to participate in the
20 conspiracy through his own actions. And you heard
21 that through co-conspirator, after co-conspirator,
22 after co-conspirator, and you saw it in document,
23 after document, after document.

24 I'll just touch very, very quickly on the burden
25 of proof. The Government has the burden of proof

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1 beyond a reasonable doubt, the same as in every
2 criminal case in the United States. And according to
3 Judge Dominguez's instructions which he'll read to
4 you, he'll tell you that the law does not require that
5 the Government prove guilt beyond all possible doubt,
6 Proof beyond a reasonable doubt is sufficient to
7 convict. Everything else you've heard from the
8 defense on this subject is spin.

9 Secondly, even if you have doubt as to one issue
10 or one witness or one piece of evidence, that's not
11 the same thing as reasonable doubt as to guilt. The
12 jury instruction that Judge Dominguez is going to read
13 you about the meaning of a conspiracy says, "In
14 determining whether a conspiracy's been proved, you
15 must view the evidence as whole and not piecemeal.
16 You should consider the actions and statements of all
17 the alleged conspirators. The conspiracy may be
18 inferred from all the circumstances and the actions
19 and statements of the participants."

20 So, if viewing the evidence as a whole, you do not
21 have a doubt based on reason or common sense, you
22 should vote to find this defendant guilty.

23 THE COURT: Five minutes.

24 MR. SNYDER: Thank you, Your Honor.

25 Defendant's closing really boils down to the

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1 argument that you shouldn't believe his
2 co-conspirators; that they're lying. Ms. Moss called
3 them snitches because they confessed what they did and
4 what Mr. Peake did.

5 They said you shouldn't believe them when they say
6 that Frank Peake knew about the conspiracy. They said
7 you shouldn't believe them when they say that Frank
8 Peake was involved in the conspiracy; that they're all
9 lying, that they lied repeatedly. They need you to
10 believe that. That somehow when Greg Glova taped that
11 call on search day and asked Gabe Serra to call Frank
12 Peake about Plaza Provisions, that that was a lie
13 somehow. That Gabe Serra's search day confession to
14 the F.B.I., that that was a lie. And that all of
15 their testimony here to you, that that's all been a
16 lie.

17 The defense claims you shouldn't believe that
18 Frank Peake was involved in the conspiracy because he
19 didn't communicate every day like Peter Baci and Greg
20 Glova, or he didn't have a gmail account. Of course,
21 that wasn't his role. He was the boss. He didn't
22 want to get his hands dirty. We know that because
23 Peter Baci told you that. He was told not to copy
24 Frank Peake on gmails. But we know that Frank Peake
25 got some of the gmails because, as you recall, his

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1 name is in the gmail contact list in the lighthouse123
2 account. It got there because he was copied on
3 gmails.

4 Frank Peake let Peter Baci do the dirty work, let
5 him get his hands dirty every single day, and now he's
6 trying to get Peter Baci to take the fall all by
7 himself.

8 The defense also claims that you shouldn't believe
9 Gabe Serra because he reached agreements with Lenny
10 Shapiro and because he lied to get a deal from the
11 Government. But why did Gabe Serra plead guilty? Why
12 did he agree to go to jail? He said that he was too
13 busy with other things to get involved day-to-day with
14 the conspiracy. He didn't have a secret gmail
15 account. He didn't have a code name. But he told you
16 that he confessed to the F.B.I. because he knew he was
17 on enough documents that he was going to get caught.
18 He was asked, "If you denied involvement for the first
19 hour, what did you do for the other six?"

20 "ANSWER: I realized that I knew my involvement of
21 what I was considered to be inappropriate, I felt that
22 there was probably going to be enough evidence and I
23 decided to come forth with the truth."

24 Here is the thing: Gabe Serra was on virtually
25 all the same documents that Frank Peake was on. Most

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1 of the documents that Gabe Serra knew he was on were
2 his communications with Frank Peake. He knew those
3 documents made him guilty. He knew they proved his
4 participation in the conspiracy. Gabe Serra told you
5 that 90 percent of his communications with Frank Peake
6 were perfectly innocent, perfectly legal, social, TSA,
7 third ship. The other 10 percent was the problem.
8 The other 10 percent was improper. The other
9 10 percent was illegal.

10 Here is what he said. "Sir, if 90 percent of your
11 communications with Frank Peake were legitimate or
12 appropriate, why did you plead guilty?"

13 "ANSWER: I just heard this once, if a glass is 90
14 percent full of clear water and 10 percent sewer, it's
15 not drinkable. I knew that 10 percent was enough to
16 have been wrong."

17 Frank Peake's glass of water is infected by that
18 same 10 percent of sewer water as Gabe Serra's. It's
19 dirty and that 10 percent is enough to find him
20 guilty.

21 THE COURT: One minute left.

22 MR. SNYDER: I will wrap up with my minute simply
23 by saying that crimes like price-fixing don't happen
24 and they can't work unless people choose to
25 participate, from presidents of companies down to

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1 executives who are responsible for the day-to-day
2 operations. This trial is about one of those
3 executives, Frank Peake, and you've heard from people
4 who were on the inside of the conspiracy, men who
5 accepted responsibility, men who pled guilty, men who
6 paid the price and agreed to tell the truth. They
7 told you that Frank Peake participated.

8 Mr. Peake went to trial and he exercised his right
9 to put the Government to its burden of proof, and he
10 had every right to do that. But we've now shown you
11 the proof, we've shown you beyond a reasonable doubt
12 that Frank Peake chose to join this price-fixing
13 conspiracy, he chose to stay in it, and he chose not
14 to stop it as he could have, as the president of the
15 company. So he should be held responsible, and in a
16 minute this case is going to be in your hands and
17 you're going to begin your deliberations and you're
18 going to consider the evidence, examine the documents,
19 apply your common sense and apply the law.

20 And after you do, I am confident that you're going
21 to return a guilty verdict, a verdict of guilty
22 against Frank Peake.

23 Thank you.

24 THE COURT: All right. The instructions take
25 about an hour. The Court will give you a 15-minute

1 break at this time. Thank you.

2 THE DEPUTY MARSHAL: All rise.

3 THE COURT: You should not be making any
4 determinations until you hear -- you're ordered --
5 until you hear the instructions.

6 (Jury out.)

7 (Whereupon a recess was taken, after which the
8 following proceedings took place.)

9 THE COURT: Members of the jury, now that all the
10 evidence is in and the parties have rested, it becomes
11 my duty to instruct you on the applicable law to this
12 case.

13 Duty of the Jury to Find the Facts and Follow the
14 Law. It is your duty to find the facts from all the
15 evidence admitted in this case. To those facts, you
16 must apply the law as I give it to you. The
17 determination of the law is my duty as the presiding
18 Judge in this courtroom. It is your duty to apply the
19 law exactly as I give it to you whether you agree with
20 it or not.

21 You must not be influenced by any personal likes
22 or dislikes, prejudices or sympathy. That means that
23 you must decide the case solely on the evidence before
24 you and according to the law. You will recall that
25 you took an oath promising to do so at the beginning

1 of the case.

2 In following my instructions, you must follow all
3 of them and not single out some and ignore others.
4 They are all equally important. You must not read
5 into these instructions, or into anything I may have
6 said or done, any suggestion by me as to what verdict
7 you should return. That is a matter entirely for you
8 to decide.

9 Presumption of Innocence. Proof beyond a
10 reasonable doubt. It is a cardinal principle of our
11 system of justice that every person accused of a crime
12 is presumed to be innocent unless and until his or her
13 guilt is established beyond a reasonable doubt. The
14 presumption is not a mere formality, it is a matter of
15 the most important substance.

16 The presumption of innocence alone may be
17 sufficient to raise a reasonable doubt and to require
18 the acquittal of a defendant. The defendant before
19 you, Mr. Frank Peake, has the benefit of that
20 presumption throughout the trial and you are not to
21 convict him unless you are persuaded of his guilt
22 beyond a reasonable doubt.

23 The presumption of innocence until proven guilty
24 means that the burden of proof is always on the
25 Government to satisfy you that Mr. Peake is guilty of

1 the crime with which he is charged beyond a reasonable
2 doubt. The law does not require that the Government
3 prove guilt beyond all possible doubt. Proof beyond a
4 reasonable doubt is sufficient to convict.

5 This burden never shifts to Mr. Peake. It is
6 always the Government's burden to prove each of the
7 elements of the crimes charged beyond a reasonable
8 doubt by the evidence and the reasonable inferences to
9 be drawn from the evidence.

10 Mr. Peake has the right to rely upon the failure
11 or inability of the Government to establish beyond a
12 reasonable doubt any essential element of a crime
13 charged against him.

14 If after a fair and impartial consideration of all
15 the evidence, you have a reasonable doubt as to
16 defendant's guilt of the charged crime, it is your
17 duty to acquit him of that crime.

18 On the other hand, if after a fair and impartial
19 consideration of all the evidence, you are satisfied
20 beyond a reasonable doubt of Mr. Peake's guilt of the
21 crime charged, you should find him guilty of that
22 crime.

23 Defendant's Constitutional Right Not to Testify.
24 Mr. Peake has a constitutional right not to testify,
25 and no inference of guilt or anything else may be

1 drawn from the fact that the defendant did not
2 testify. For any of you to draw such an inference
3 would be wrong; indeed, it would be a violation of
4 your oath as a juror.

5 What is Evidence and Inferences. The evidence
6 from which you are to decide what the facts are
7 consists of the sworn testimony of the witnesses, both
8 on direct and cross-examination, regardless of who
9 called the witness; the exhibits that have been
10 received into evidence, and any fact to which the
11 lawyers have agreed or stipulated. Although you may
12 consider only the evidence presented in the case, you
13 are not limited, in considering that evidence, to the
14 bald statements made by the witnesses or contained in
15 the documents.

16 In other words, you are not limited solely to what
17 you see and hear as the witnesses testify. You are
18 permitted to draw from facts that you find to have
19 been proven, such as reasonable inferences as you
20 believe are justified in the light of common sense and
21 personal experience.

22 Kinds of Evidence: Direct and circumstantial.
23 There are two kinds of evidence, direct and
24 circumstantial. Direct evidence is direct proof of a
25 fact, such as a testimony of an eyewitness that the

1 witness saw something. Circumstantial evidence is
2 indirect evidence that is proof of a fact or facts
3 from which you can draw the inference, by reason or
4 common sense, that another fact exists even though it
5 has not been proven directly.

6 You are entitled to consider both kinds of
7 evidence. The law permits you to give equal weight to
8 both. But it is for you to decide how much weight to
9 give to any evidence.

10 What is not evidence? Certain things are not
11 evidence and I will list them for you.

12 One, arguments and statements by lawyers are not
13 evidence. The lawyers are not witnesses. What they
14 say in their opening statements, closing arguments,
15 and other items, is intended to help you interpret the
16 evidence. But it is not evidence. If the facts, as
17 you remember them from the evidence, differ from the
18 way the lawyers have stated them, your memory of them
19 controls.

20 Two, questions and objections by lawyers are not
21 evidence. Lawyers have a duty to their clients to
22 object when they believe the question is improper
23 under the rules of evidence. You should not be
24 influenced by the objection or by my ruling on it.
25 Anything that I have excluded from evidence or ordered

1 stricken and instructed you to disregard is not
2 evidence, you must not consider such items.

3 Anything you may have seen or heard when the Court
4 was not in session is not evidence. You are to decide
5 the case solely on the evidence received at trial.

6 The Indictment is not evidence. This case, like
7 most criminal cases, began with an Indictment. You
8 will have the Indictment before you in the course of
9 your deliberations in the jury room. That Indictment
10 was returned by a grand jury which heard only the
11 Government's side of the case. I caution you, as I
12 have before, that the fact that Mr. Peake has had an
13 Indictment filed against him is no evidence whatsoever
14 of his guilt.

15 The Indictment is simply an accusation. It is the
16 means by which the allegation and the charges of the
17 Government are brought before this Court. The
18 Indictment proves nothing.

19 Number of Witnesses and Credibility of Witnesses.
20 Whether the Government has sustained its burden of
21 proof does not depend upon the number of witness it
22 has called or upon the number of exhibits it has
23 offered, but instead upon the nature and quality of
24 the evidence presented. You do not have to accept the
25 testimony of any witness if you find the witness not

1 credible. You must decide which witnesses to believe
2 and which facts are true. To do this, you must look
3 at all the evidence, drawing upon your common sense
4 and your personal experience.

5 You may want to take into consideration such
6 factors as a witness' conduct and demeanor while
7 testifying; their apparent fairness or any bias they
8 may have displayed; any interest you may discern that
9 they may have in the outcome of the case; any
10 prejudice they may have shown; their opportunities for
11 seeing and knowing the things about which they have
12 testified; the reasonableness or the unreasonableness
13 of the events that they have related to you in their
14 testimony, and any other facts or circumstances
15 disclosed by the evidence that tends to corroborate or
16 contradict their version of the events.

17 Inconsistencies or discrepancies in the testimony
18 of a witness, or between the testimony of different
19 witnesses, may or may not cause you to disbelieve or
20 discredit such testimony. Two or more persons
21 witnessing an incident or a transaction may simply see
22 or hear it differently. As to the credibility of any
23 witness, an innocent misrecollection or a failure to
24 recall is not an uncommon experience.

25 In weighing the effect of a discrepancy, however,

1 also consider whether it pertains to a matter of
2 importance or an insignificant detail, and consider
3 whether the discrepancy results from innocent error or
4 from intentional falsehood.

5 Therefore, after evaluating a witness' testimony
6 pursuant to this instruction, you have three choices:

7 One, you believe him totally.

8 Two, you reject his testimony totally.

9 And, three, you believe him partially.

10 Caution as to Cooperating Witnesses. You also
11 have heard the testimony of Peter Baci, Gregory Glova
12 and Gabriel Serra, who were all charged as defendants
13 in a parallel case, were convicted of participating in
14 the instant conspiracy, and entered into cooperation
15 agreements with the Government. Some people in this
16 position are entirely truthful when testifying.

17 Still, you should consider the testimony of these
18 individuals with particular caution. They may have
19 had reasons to make up stories or to exaggerate what
20 others did because they wanted to help themselves.

21 You must determine whether the testimony of such
22 witness may have been affected by any interest in the
23 outcome of the instant case, any prejudice for or
24 against Mr. Peake, or by any of the benefits offered
25 by the Government in the plea agreements.

1 You are not to consider their guilty pleas as
2 evidence against Mr. Peake.

3 Impeachment by prior inconsistent statement: You
4 have heard evidence that before testifying at this
5 trial, some witnesses made a statement concerning the
6 same subject matter as his testimony in this trial.
7 You may consider that earlier statement to help you
8 decide how much of the witness' testimony to believe.
9 If you find that the prior testimony was not
10 consistent with the witness' testimony at the trial,
11 then you should decide whether that affects the
12 believability of the witness' testimony at this trial.

13 Indictment: The Court includes as part of the
14 instructions the Indictment. The Indictment is only
15 an accusation, nothing more. It is not evidence. It
16 is not proof of guilt or anything else.

17 Judge's Questions. During the course of a trial,
18 I occasionally asked questions of a witness in order
19 to bring out facts not then fully covered in the
20 testimony. Do not assume that I hold any opinion on
21 the matters to which my questions are related.

22 Remember, at all times that you, as jurors, are at
23 liberty to disregard all comments of the Court in
24 arriving at your own findings as to the facts.

25 Attorney interviewing witnesses: It is proper

1 for, and thus, no improper inference should be made as
2 to attorneys and U.S. attorneys interviewing witnesses
3 prior to trial, as well as meeting and interviewing
4 any witness in preparation for trial.

5 Charged Offense. These instructions that I have
6 just provided you are general instructions applicable
7 to all criminal cases. Now we go to the instructions
8 that have to do with this case in particular.

9 The Indictment charges a violation of Section 1 of
10 the Sherman Act, which provides, "Every contract,
11 combination or conspiracy in restraint of trade is
12 declared to be illegal. Every person who shall make
13 any contract or engage in any combination or
14 conspiracy hereby declared to be illegal, shall be
15 deemed guilty of an offense against the United States.
16 The term persons includes individuals, corporations,
17 partnerships, and every other association or
18 organization of every kind and character."

19 Elements of the Offense. In order to establish
20 the offense of conspiracy to fix prices, charged in
21 the Indictment, the Government must prove each of
22 these elements beyond a reasonable doubt:

23 One, that the conspiracy described in the
24 Indictment existed at or about the time alleged.

25 Two, that the defendant knowingly and

1 intentionally became a member of the conspiracy.

2 And, three, that the conspiracy described in the
3 Indictment either affected interstate commerce in
4 goods or services, or occurred within the flow of
5 interstate commerce in goods or services.

6 If you find from your consideration of all the
7 evidence that each of these elements has been proved
8 beyond a reasonable doubt, then you should find the
9 defendant guilty.

10 If, on the other hand, you find from your
11 consideration of all the evidence that any of these
12 elements has not been proved beyond a reasonable
13 doubt, then you should find the defendant not guilty.

14 Conspiracy Explained. The type of relationship
15 condemned by the Sherman Act as a conspiracy is often
16 described as "a partnership in crime," in which each
17 person found to be a member of the conspiracy is
18 liable for all acts and statements of other members
19 made during the existence of and in furtherance of the
20 conspiracy. To create such a relationship, two or
21 more persons must enter into an agreement or mutual
22 understanding that they will act together for some
23 unlawful purpose or to achieve a lawful purpose by
24 unlawful means. It is the agreement to act together
25 that constitutes the crime, whether the agreement

1 actually is carried out or whether it succeeds or
2 fails, does not matter.

3 In order to establish the existence of a
4 conspiracy the evidence need not show that the members
5 of the conspiracy entered into any express, formal or
6 written agreement, that they met together, or that
7 they directly stated what their objective or purpose
8 was or the details of it, or the means by which the
9 object was to be accomplished.

10 The agreement itself may have been entirely
11 unspoken. What the evidence must show in order to
12 prove that a conspiracy existed, is that the alleged
13 members of the conspiracy, in some way, came to an
14 agreement or mutual understanding to accomplish a
15 common purpose.

16 Direct proof of a conspiracy may not be available.
17 A conspiracy may, however, be disclosed by the
18 circumstances or by the acts of its members.

19 Therefore, you may infer the existence of a
20 conspiracy from what you find the parties actually did
21 as well as from the words they used. However,
22 competitors may have legitimate, lawful reasons to
23 have contact with each other. Mere similarity of
24 conduct among various persons or the fact that they
25 may have associated with one another and may have met

1 or assembled together and discussed common aims and
2 interests, does not necessarily establish the
3 existence of a conspiracy.

4 If actions were taken independently by them solely
5 as a matter of individual business judgment, without
6 any agreement or mutual understanding among them, then
7 there would be no conspiracy.

8 A conspiracy may vary in its membership from time
9 to time. It may be formed without all the parties
10 coming to an agreement at the same time, knowing all
11 the details of the agreement or knowing who all the
12 other members are. Thus, you need not find that the
13 defendant agreed specifically to or knew about all the
14 details of the crime, or knew every other
15 co-conspirator or that he participated in each act of
16 the agreement or played a major role.

17 But the Government must prove beyond a reasonable
18 doubt that he knew the essential features and general
19 aims of the conspiracy.

20 Further, it is not necessary that a person agreed
21 to play any particular part in carrying out the
22 agreements or understanding.

23 A person may become a member of a conspiracy even
24 if that person agrees to play only a minor part in the
25 conspiracy, as long as that person has an

1 understanding of the unlawful nature of the plan and
2 voluntarily and intentionally joins in it.

3 Even if the defendant was not part of the
4 agreement at the very start, he can be found guilty of
5 conspiracy if the Government proves that he knowingly
6 joined the agreement later. It is not essential that
7 all members acted exactly alike or agreed to play any
8 particular part in carrying out the agreement.

9 The unlawful agreement may be shown if the proof
10 establishes that the parties knowingly worked together
11 to accomplish a common purpose. In determining
12 whether a conspiracy has been proved, you must view
13 the evidence as a whole and not piecemeal. You should
14 consider the actions and statements of all the alleged
15 conspirators. The conspiracy may be inferred from all
16 the circumstances and the actions and statements of
17 the participants. Acts that are, by themselves,
18 wholly innocent acts may be part of the sum of the
19 acts that make up a conspiracy to restrain trade, in
20 violation of the Sherman Act. The evidence does not
21 have to establish that the defendant agreed to all the
22 means or methods set forth in the Indictment or that
23 such means or methods were actually used. Nor does
24 the evidence have to show that all the persons alleged
25 to have been members of the conspiracy actually were

1 members.

2 What the evidence must show is that the conspiracy
3 charged existed at or about the time stated in the
4 Indictment and that the defendant knowingly and
5 intentionally became a member of the conspiracy. A
6 conspiracy only ends when its purpose and objective
7 have been accomplished or all the parties to the
8 conspiracy abandoned or terminate it.

9 Price-fixing. The Indictment charges the
10 defendant with conspiracy to fix prices.

11 A conspiracy to fix price is an agreement or a
12 mutual understanding between two or more persons from
13 competing companies, to fix, control, raise, lower,
14 maintain, or stabilize the prices charged or to be
15 charged for products or services.

16 A price-fixing conspiracy is commonly thought of
17 as an agreement to establish the same price; however,
18 prices may be fixed in other ways. Prices or, in this
19 case, freight rates and surcharges are fixed if the
20 range or level of rates or surcharges is agreed upon
21 by the conspirators. Prices are also fixed if some
22 component of the total price or rate is agreed upon.
23 They are considered fixed because they are agreed
24 upon. Thus, any agreement to raise a price, to set a
25 maximum price, to stabilize a price, to set a price or

1 price range, to set a component of a rate, to set a
2 surcharge or to maintain a price, is illegal.

3 If you should find that the defendant entered into
4 an agreement to fix prices, it does not matter whether
5 the rates or surcharges agreed upon were reasonable or
6 unreasonable, justifiable or unjustifiable, or harmful
7 or harmless. If you should find that the defendant
8 entered into an agreement to fix prices, the fact that
9 the defendant or his co-conspirators did not abide by
10 it or that one or more of them may not have lived up
11 to some aspect of the agreement, or that they may not
12 have been successful in achieving their objective, is
13 no defense. The agreement is the crime even if it is
14 never carried out.

15 If the conspiracy charged in the Indictment is
16 proved, it is no defense that the conspirators
17 actually competed with each other in some manner or
18 that they did not conspire to eliminate all
19 competition. Nor is it a defense that the
20 conspirators did not attempt to collude with all of
21 their competitors. Similarly, the conspiracy is
22 unlawful if it did not extend to all services sold by
23 the conspirator or did not affect all of their
24 customers. Evidence of similarity of business
25 practice of the defendant and alleged co-conspirators,

1 or the fact that they may have charged identical
2 prices for the same goods, does not alone establish an
3 agreement to fix prices, since such activities may be
4 consistent with ordinary and proper competitive
5 behavior in a free and open market.

6 The defendant and alleged conspirators may charge
7 the same prices, may copy each other's price lists or
8 may follow and conform exactly to each other's prices,
9 policies and price changes, and such conduct would not
10 violate the Sherman Act unless you find that it was
11 done pursuant to an agreement between two or more
12 conspirators, as alleged in the Indictment.

13 Nevertheless, you may consider such factors and
14 circumstances, along with all other evidence, in
15 determining whether the evidence of competition,
16 evidence of pricing actually charged, similarity of
17 business practice and similarity of prices, resulted
18 from the independent act or business judges of the
19 defendant and alleged co-conspirators freely competing
20 in the open market, or whether it resulted from an
21 agreement among or between two or more of them.

22 Now I go back to the three elements of the
23 conspiracy. As previously noted, the second element
24 that the Government must prove beyond a reasonable
25 doubt for you to find the defendant guilty is that the

1 defendant knowingly joined in the conspiracy charged
2 in the indictment. To act knowingly means to act
3 voluntarily and intentionally, and not because of
4 mistake, accident, or other innocent reason.

5 Therefore, before you may convict the defendant,
6 the evidence must establish that the defendant joined
7 the conspiracy to fix prices with intent to aid or
8 advance the object or purpose of the conspiracy.

9 A person may become a member of a conspiracy
10 without full knowledge of all the details of the
11 conspiracy, the identity of all its members, or the
12 parts they played in the charged conspiracy.
13 Knowledge of the essential nature of the conspiracy is
14 enough.

15 On the other hand, a person who has no knowledge
16 of a conspiracy, but who happens to act in a way which
17 furthers some object or purpose of the conspiracy,
18 does not, thereby, become a member of the conspiracy.

19 Similarly, mere knowledge of a conspiracy, without
20 participation in the conspiracy, is also insufficient
21 to make a person a member of the conspiracy.

22 Mere presence at the scene of the conspiracy is
23 insufficient to make a person a member of the
24 conspiracy, but you may consider it among other
25 factors.

1 Your determination whether the defendant knowingly
2 joined the conspiracy must be based solely on the
3 actions of the defendant as established by the
4 evidence.

5 You should not consider what others may have said
6 or done to join the conspiracy. Membership of the
7 defendant in this conspiracy must be established by
8 evidence of his own conduct, by what he said or did.

9 If you find that the defendant joined the
10 conspiracy, then the defendant is presumed to remain a
11 member of the conspiracy and is responsible for all
12 action taken in furtherance of the conspiracy until
13 the conspiracy has been completed or abandoned, or
14 until the defendant has withdrawn from the conspiracy.

15 Interstate commerce: The third element of an
16 offense prohibited by the Sherman Act is that the
17 alleged unlawful conduct must involve interstate trade
18 or commerce. The Government must prove beyond a
19 reasonable doubt that the conspiracy charged in the
20 Indictment either affected interstate commerce in
21 goods or service or occurred within the flow of
22 interstate commerce in goods or services. The term
23 *interstate commerce* includes transactions that move
24 between states or between states and other place under
25 the jurisdiction of the United States.

1 Puerto Rico is treated as a state for purposes of
2 interstate commerce.

3 If the conduct charged in the Indictment involves
4 transactions that are now in the flow of commerce --
5 excuse me, no. If the conduct charged in the
6 Indictment involves transactions that are in the flow
7 of commerce, the interstate commerce element is
8 satisfied and the size of such transaction is of no
9 significance.

10 Statute of Limitations. The Indictment charges
11 that the alleged conspiracy began at least as early as
12 2005 and continued at least until April 2008.

13 The Government need not prove that the conspiracy
14 existed on those exact dates or that the conspiracy
15 continued for the entire period charged in the
16 Indictment. It is sufficient if the Government proves
17 beyond a reasonable doubt that the conspiracy existed
18 during or reasonably near the time period alleged in
19 the Indictment and that defendant joined the
20 conspiracy sometime during the period alleged in the
21 Indictment.

22 The grand jury returned its Indictment of the
23 defendant on November 17th, 2011. There is a
24 five-year statute of limitations which applies to the
25 offense charged. This means that the defendant cannot

1 be found guilty unless you find, beyond a reasonable
2 doubt, that the conspiracy existed at some point
3 within the period of the statute of limitations,
4 which, for purposes of this case, is the period
5 beginning on November 17th, 2006, and continuing until
6 November 17th, 2011.

7 One way the Government can prove the conspiracy
8 existed in this period is to prove that one or more
9 members of the conspiracy performed some act after
10 November 17th, 2006, and before November 17th, 2011,
11 in furtherance of the purpose and objectives of the
12 conspiracy.

13 You may consider evidence of defendant's conduct
14 prior to November 17th, 2006, insofar as it tends to
15 prove or disprove the existence of the conspiracy and
16 the defendant's acts after that date.

17 Venue. Before you can find the defendant guilty
18 of committing the crime charged in the Indictment, you
19 must find by a preponderance of the evidence that from
20 at least as early as 2005, and continuing until at
21 least April of 2008, the conspiratorial agreement or
22 some act in furtherance of the conspiracy by any
23 member of the conspiracy occurred in the District of
24 Puerto Rico.

25 To prove something by preponderance of the

1 evidence is to prove it is more likely true than not
2 true. This is a lesser standard than beyond a
3 reasonable doubt. It is the only standard that can be
4 proven other than beyond a reasonable doubt.

5 What Not to Consider. The fact that Puerto Rico
6 may have potentially been affected, or consumers and
7 other prices and/or businesses, is not to be
8 considered by you in your judgment as to guilt or not
9 guilt of the defendant.

10 The effect on businesses, prices, or consumers in
11 Puerto Rico is not an element of the offense. You are
12 not to decide this case based on pity and sympathy to
13 Puerto Rican business, to Puerto Rico, or to Puerto
14 Rican consumers. The effect on Puerto Rico is only
15 material as to potentially establishing an effect in
16 interstate commerce and as to establishing venue.

17 This case is about a potential conspiracy in
18 violation of the antitrust law and whether or not the
19 defendant, Mr. Peake, joined the conspiracy, complying
20 with the elements of the offense, as more fully stated
21 in the instructions read to you.

22 Sympathy to Puerto Rico, its business or
23 consumers, does not play any role in your
24 consideration of this case. Any statement made in
25 opening statement or any question and answer that may

1 have implied or that you may have understood that this
2 case is relating to the effects on Puerto Rico is an
3 erroneous interpretation. I sternly order you not to
4 take such statements into consideration.

5 So, therefore, any effect on Puerto Rico is not to
6 be considered at all, except as to the potential
7 establishing an effect on interstate commerce and/or
8 to venue, as previously stated.

9 Co-conspirators Not on Trial. The Indictment
10 charges that the defendant conspired with certain
11 persons and companies that are not on trial. There is
12 no requirement that all members of a conspiracy be
13 charged and prosecuted or tried together in one
14 proceeding. You should not be concerned with, or
15 speculate about, why certain persons or companies are
16 not on trial, or about why any person or companies
17 have not been charged in the Indictment.

18 Charts and Summaries admitted under Federal Rule
19 of Evidence 1006. The Government has presented
20 exhibits in the form of charts and summaries. I
21 decided to admit these charts and summaries in place
22 of the underlying documents that they represent. You
23 should consider the charts and summaries admitted into
24 evidence as you would any other evidence and assign to
25 them the weight you believe appropriate.

1 Demonstrative Charts and Summaries Not Admitted.
2 Certain charts and summaries have been shown to you in
3 order to help you understand the facts disclosed by
4 books, records, and other documents which are in
5 evidence in the case. They are not themselves
6 evidence or proof of any facts. If they do not
7 correctly reflect the facts shown by the evidence in
8 this case, you should disregard these charts and
9 summaries and determine the facts from the underlying
10 evidence.

11 Note-taking. You have been permitted to take
12 notes during the trial. Most of you, perhaps all of
13 you, have taken advantage of that opportunity. You
14 must use your notes only as a memory aid during the
15 deliberations. You must not give your notes priority
16 over your independent recollection of the evidence,
17 and you must not allow yourself to be unduly
18 influenced by the notes of the jurors.

19 I emphasize that the notes are not entitled to any
20 greater weight than your memories or impressions about
21 the testimony.

22 Now, I come to the instructions as to your
23 deliberations.

24 Duty to Deliberate. Any verdict must represent
25 the considered judgment of each one of you. In order

1 to return a verdict, it is necessary that each juror
2 agree to it; in other words, your verdict must be
3 unanimous.

4 It is your duty as jurors to consult with one
5 another and to deliberate in an effort to reach an
6 agreement, if you can do so without violence to your
7 individual judgment.

8 Each of you must decide the case for yourself, but
9 only after an impartial consideration of evidence in
10 the case with your fellow jurors. In the course of
11 your deliberations, do not hesitate to reexamine your
12 own views and change your opinion if convinced it is
13 erroneous. But do not surrender your honest
14 conviction as to the weight or the effect of the
15 evidence solely because of the opinion of your fellow
16 jurors, or for the mere purpose of returning a
17 verdict.

18 Remember, at all times, you are not partisans; you
19 are the judges of the facts. Your sole interest is to
20 determine from the evidence in this case whether the
21 Government has proved its case beyond a reasonable
22 doubt.

23 Consideration of Evidence. Your verdict must be
24 based solely on the evidence and on the law as I give
25 it to you in these instructions. However, nothing

1 that I have said or done is intended to suggest what
2 your verdict should be. That is entirely for you to
3 decide.

4 Jury Not to Consider Punishment. The punishment
5 provided by law for the offense charged in the
6 Indictment is a matter exclusively within the province
7 of the Judge and should never be considered by you, in
8 any way, in arriving at an impartial verdict as to the
9 guilt or innocence of the defendant, Mr. Frank Peake.

10 Now, Foreperson. I come now to the last part of
11 the instructions, the rules for your deliberation.
12 When you retire, you will discuss the case with other
13 jurors to reach agreement, if you can do so. You
14 shall permit your foreperson to preside over your
15 deliberations, and your foreperson will speak for you
16 here in court. I repeat, your verdict must be
17 unanimous.

18 Communications with the Court. If it becomes
19 necessary during your deliberations to communicate
20 with the Court, you may send a written note through a
21 marshal, signed by your foreperson or by one or more
22 members of the jury. No member of the jury shall ever
23 attempt to communicate with the Court by any means
24 other than a signed written note, and the Court will
25 never communicate with any member of the jury on any

1 subject touching the merits of the case otherwise than
2 in writing or orally in open court. If you send out a
3 question, I will consult with the parties as promptly
4 as possible before answering it, which may take some
5 time. You may continue with your deliberations while
6 waiting for the answer to any question. Remember that
7 you are not to tell anyone, including me, how the jury
8 stands numerically, or otherwise, until you have
9 reached a unanimous verdict or have been discharged.

10 Mr. Flaquer, please take the jury verdict form.

11 Now I want to read to you what is called the
12 Verdict Form. This is simply the written notice of
13 the decision you will reach in this case.

14 Jury Verdict Form. All questions asked in this
15 jury verdict form are to be determined unanimously by
16 jury vote.

17 Count one. We, the jury, in the above-entitled
18 action unanimously find defendant, Frank Peake, not
19 guilty or guilty.

20 In San Juan, Puerto Rico, this date of January
21 2013. Foreperson's signature and date and time.

22 After you have reached a unanimous agreement on a
23 verdict, your foreperson will fill in the form that
24 has been given to you, sign and date it, and advise
25 the jury officer outside your door that you are ready

1 to return to the courtroom.

2 After you return to the courtroom, your foreperson
3 will deliver the completed verdict form as directed in
4 open court.

5 The foreperson is to be elected among yourselves,
6 he or she will sign any jury verdict form or written
7 question to the Court together with any one of you, if
8 you deem so.

9 Can I see counsel at this time.

10 (Bench conference held off the record with all
11 defense counsel and counsel for the Government, after
12 which the following proceedings took place in open
13 court.)

14 THE COURT: I have modified the jury verdict form
15 to read, "The question asked in the jury verdict form
16 is to be determined by a unanimous jury vote.

17 "Count one. We, the jury, in the above action
18 unanimously find defendant, Frank Peake, not guilty or
19 guilty."

20 (Whereupon the following proceedings took place at
21 sidebar.)

22 THE COURT: Any objections to this change?

23 MR. MARKUS: No, Your Honor.

24 THE COURT: Because this sounds like more than one
25 question.

1 MS. MOSS: Right.

2 THE COURT: So please amend this accordingly.

3 THE CLERK: Yes.

4 THE COURT: Any objections to the instructions?

5 MR. MARKUS: Judge, in addition to those
6 previously filed --

7 THE COURT: No, no, mention all of them, mention
8 all of them.

9 MR. MARKUS: The missing witness instruction.
10 Venue beyond a reasonable doubt. Our theory of
11 defense instruction, Your Honor. Maybe I should read
12 that.

13 THE COURT: Yes, read it, I have no problem.

14 MR. MARKUS: "Mr. Peake does not contest that
15 there was a conspiracy that existed between Gabriel
16 Serra, Kevin Gill, Gregory Glova, and Peter Baci.
17 Rather, he contends that he did not knowingly and
18 intentionally participate in this conspiracy and did
19 not knowingly and intentionally join the conspiracy as
20 a member. Mr. Peake further contends that any
21 discussions he had with Gabriel Serra were legitimate
22 and competitive discussions and not anticompetitive
23 conspiracy related.

24 "Mr. Peake also contends that he was competing
25 with Horizon, including on market share and price.

1 Although this is Mr. Peake's defense, the burden
2 always remains on the Government to prove the elements
3 of the offense beyond a reasonable doubt. If you do
4 not believe the Government has proven beyond a
5 reasonable doubt that Mr. Peake intentionally and
6 knowingly joined the conspiracy, you must find him not
7 guilty."

8 THE COURT: Anything further?

9 MR. MARKUS: The only last one, Your Honor, was
10 the one that I had mentioned on Page 18. I had
11 requested that you also instruct the jury that a
12 witness' refusal to be interviewed by the defense be
13 something that they can consider.

14 THE COURT: Excuse me? Read me that instruction.

15 MR. MARKUS: Yes, Your Honor.

16 "A witness' refusal to be interviewed by one party
17 or the other can be considered by you in determining
18 his credibility."

19 THE COURT: All right. I'll take that one first,
20 unless you have anything further.

21 MR. MARKUS: No, Your Honor, nothing further.

22 THE COURT: I think we discussed them all in good
23 faith in the charge conference, and I think we're all
24 prepared.

25 MR. MARKUS: Yes, Your Honor.

1 THE COURT: So let me simply, briefly, advise you
2 what my opinion is relating to the cooperators being
3 interviewed by the defense.

4 As I understand Roviario, the defense is entitled
5 to have any cooperator be interviewed, but the
6 decision is on the person being interviewed, away from
7 both the defense and the United States, because the
8 decision is not the Court's, it's not the defense's,
9 and it is not the United States'.

10 Since the decision is as to none, the decision is
11 his, the fact that he does not want to interview, I
12 don't think creates a presumption of anything.

13 That is the position of the Court, unless you want
14 to supplement.

15 MR. SNYDER: No.

16 THE COURT: Let's go now to the missing witness
17 instruction.

18 MR. SNYDER: Obviously, the United States opposes
19 that instruction, because even witnesses that would
20 have been available to the Government -- I believe
21 Bill Stallings was the one that was specifically
22 mentioned, are equally available to the defense. They
23 could subpoena him.

24 MR. MARKUS: And our position, Judge, just so the
25 record is clear, is that Bill Stallings was granted

1 full immunity and, therefore, was a special sort of
2 witness that was under the control of the United
3 States.

4 THE COURT: The position of the Court is the
5 position of the instructions. The position of the
6 instructions is that the United States does not have
7 to bring in all of the conspirators or the super
8 conspirator.

9 The position of the Court is that the United
10 States brings in whoever they understand is going to
11 prove the elements of the offense. If it's done with
12 one witness, it's with one witness, if it's done with
13 three, three witnesses. Further, you could have
14 subpoenaed him. If you think he was so instrumental,
15 you could have subpoenaed him, and the Court would
16 have granted you the ability to subpoena the witness.

17 Let's go to the next. The next is the theory of
18 the defense. What is the position of the United
19 States?

20 MR. SNYDER: The United States opposes the theory
21 of defense instruction, on the grounds that it really
22 is a surrogate for testimony by the defendant, it's
23 not necessary. The jury is provided with instruction
24 on the law, not instruction on the arguments of the
25 parties. There's not a theory of prosecution.

1 MR. MARKUS: Your Honor, I believe the law in the
2 First Circuit is that as long as the theory of defense
3 is an accurate statement of the law and is supported
4 by evidence in the record, it should be given, and,
5 therefore, we request a theory of defense instruction.

6 THE COURT: The Court understands that the theory
7 of defense proposed -- anyway, you established it very
8 clearly in your argument, and the Court understands
9 that the instruction produced is an invitation to
10 hearsay and to put into evidence the statement of your
11 client, without sitting your client. So, the Court
12 did not, on this occasion, accept the rule of the
13 defense.

14 MR. SNYDER: And that accurately summarizes the
15 objection of the Government.

16 THE COURT: All right.

17 Now, did the Court read any instruction
18 improperly, anything that there may have been a
19 mistake in the reading?

20 MR. MARKUS: No, Your Honor.

21 MR. SNYDER: No, Your Honor. And in fact, you
22 probably corrected a couple of things along the way.

23 THE COURT: Okay. Very well.

24 So now I will swear in the marshal, I will
25 separate the alternates, and I will ask them to inform

1 me if they want to start deliberation today or Monday.

2 MR. MARKUS: Thank you, Your Honor.

3 THE COURT: This is entirely up to them, it is not
4 my decision.

5 MR. MARKUS: Your Honor, just the last instruction
6 was the venue beyond a reasonable doubt.

7 THE COURT: Yes. The venue beyond a reasonable
8 doubt, thank you. We did not discuss it. We did not
9 leave it out on purpose. You are right, you did also
10 raise this one.

11 The Court understands that the law -- this is the
12 only exception that I know in the First Circuit, and
13 in other circuits, that venue can be proven by
14 preponderance of the evidence. Okay?

15 MR. MARKUS: Yes, Your Honor.

16 THE COURT: All right. Thank you.

17 (End of discussion at sidebar.)

18 THE COURT: Okay. Ladies and gentlemen, this case
19 is now yours. Mr. Flaquer will send to you in the
20 jury room a copy of the instructions and also a copy
21 of the Indictment for your reference. The Indictment
22 is not evidence. But, since you have to -- several
23 instructions refer to the charge. You may read the
24 charge without, of course, making any reference that
25 that proves anything other than that it is a formal

1 charge.

2 All right. We will swear in a marshal at this
3 time.

4 Now, while that is occurring, the first thing that
5 the Court wants to know today is a note from you, your
6 decision, the 12 of you, whether you wish to begin
7 deliberations today or you wish to begin on Monday or
8 you wish to come on Saturday. There are many
9 alternatives to this, but the alternatives are your
10 decisions, not mine.

11 Back when I started here 40 years ago, the Judge
12 made the jury begin in the night. And that's what
13 happened. But that is not the custom anymore. You
14 don't have to follow either custom. You decide the
15 custom. All right?

16 So the first matter will be the Court will
17 separate the three alternates -- the two alternates,
18 the two alternates. The Court will separate the two
19 alternates from the regular panel of 12. And the
20 Court expects that you will inform the Court if you
21 wish to start tonight or if you wish to start Saturday
22 or if you wish to start Monday.

23 That is your decision. All right?

24 What did we get from the marshal?

25 THE CSO: He is on his way, Your Honor.

1 THE COURT: Okay. These are the two marshals in
2 charge of the jury. They will now be sworn in.

3 (Whereupon the deputy marshals were duly sworn.)

4 THE COURT: Now, we have the two marshals sworn
5 in. So, Mr. Bruno and marshal, the instructions of
6 the Court are simple: I want you to be sitting next
7 to the glass door, not next to the door, next to the
8 glass door, so that there's no impression that you're
9 eavesdropping on the United States jury. All right?

10 THE CSO: Yes, Your Honor.

11 THE COURT: It's just to avoid confusion. All
12 right?

13 Now, one last matter. We talked about *bizcochito*,
14 which is a piece of cake. That is relating to the
15 days of jury service. This is a real case. It is a
16 serious case. It is a case to be taken very seriously
17 by you. Both parties are entitled to your entire
18 attention. There's no joking there. The *bizcochito*
19 was related to time, related to time. This is a short
20 case, I think we complied with terminating this case
21 within seven days.

22 So, I don't want to create any confusion.

23 Thank you very much. And at this time, marshal,
24 twelve go together and two go together.

25 THE CSO: All rise.

1 (Jury out.)

2 THE COURT: All right. You may be seated at this
3 time. I have very serious doubts that the jury will
4 begin tonight, but it's their decision. And in the
5 meantime, so you can see the Dominguez night court in
6 operation, you are going to see five sentences
7 tonight.

8 (Recess.)

9 (Whereupon the following proceedings took place in
10 the presence of the jury.)

11 THE COURT: Okay. The Court has received a note
12 by Mr. [Name Redacted] that the jury has selected a
13 foreperson, he's Mr. [Name Redacted], and that the
14 jury has decided to stop for today and to come back on
15 Monday. This means the following: This means that on
16 Monday, when all 12 of you have arrived, you send me a
17 note and I will send you the evidence and the jury
18 instructions because I cannot send anything to three
19 of you, four of you, five of you; it's 12. All right?

20 So when the 12 are ready, you send me the note and
21 the marshal will immediately provide you the
22 instructions and all the evidence.

23 Until Monday then, thank you very much. Please
24 drive home safely.

25 The hour is 9:00. If you can make it by 9:00,

1 fine, I will be here.

2 Thank you very much.

3 THE CSO: All rise.

4 THE COURT: Have a nice weekend.

5 (Whereupon the jury exited the courtroom.)

6 THE COURT: Will counsel please approach.

7 (Bench conference on the record.)

8 THE COURT: My humble experience here of 18 years
9 is that the questions arrive in first three to four
10 hours. So I need you to be here or at least leave us
11 your phone numbers.

12 MR. SNYDER: Yes, sir.

13 MR. MARKUS: Yes, Your Honor.

14 THE COURT: Because I usually wait about half an
15 hour. I suggest that you be here because in the
16 morning is when I expect that, if there are any
17 questions, they will have them. That is my
18 experience. I think that has been yours, probably
19 yours, Mr. Snyder, also.

20 MR. SNYDER: Judge, could we inquire about the
21 practice here regarding the two alternate jurors.

22 THE COURT: The alternate jurors stay in a room.

23 MS. MOSS: They do?

24 THE COURT: They stay in a separate room. The law
25 now is that if they don't come in on Monday, that

1 person goes in, the first one goes in and joins the
2 12, and then you start anew.

3 So if on Monday only 11 show, they go. If on
4 Wednesday only 11 show, then the instructions will be
5 provided: We have a new juror, you must begin
6 deliberations anew.

7 MR. MARKUS: Okay. Judge, have a nice weekend.

8 THE COURT: Have a nice weekend.

9 (Whereupon the Court adjourned until Monday,
10 January 28, 2013.)
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REPORTER'S CERTIFICATE

I, ZULMA M. RUIZ, Official Court Reporter for the United States District Court for the District of Puerto Rico, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a true and correct computer-aided transcript of proceedings had in the within-entitled and numbered cause on the date herein set forth; and I do further certify that the foregoing transcript has been prepared by me or under my direction.

S/Zulma M. Ruiz

Official Court Reporter